TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 249

LIVINGSTON H. McCREA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, AS OWNER OF THE S. S. "AMERICAN SHIPPER", ENGINES, TACKLE, APPARATUS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED AUGUST 3, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

LIVINGSTON H. MCCREA, Libellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper", Her Engines, Tackle, Apparatus, etc., Respondent

DOCKET ENTRIES

July 11, 1928—Filed Libel.

Aug. 6, 1928—Filed Answer.

Aug. 26, 1928—Order for Commission to London, England entered.

Sept. 19, 1928—Note of Issue filed.

May 6, 1929—Filed Commission from London, England.

Oct. 2, 1931—Stipulation and Order, substituting John M. Scoble as attorney for Libellant, in place of Gilbert E. Roe, deceased, filed.

May 6, 1932—Trial before John C. Knox, Judge.

July 27, 1932—Opinion No. 7293 filed.

Aug. 12, 1932—Final Decree signed.

[fol. 2] Aug. 13, 1932—Application for Rehearing.

Aug. 15, 1932—Final Decree filed.

Aug. 30, 1932—Memorandum No. 7335 filed. Rehearing granted.

Feb. 10, 1933—Filed Opinion No. 7635.

Mar. 9, 1933—Final Decree filed. J. Knox.

Mar. 16, 1933—Notice of Appeal filed. Petition for Appeal filed. Order Allowing an Appeal filed. Assignment of Errors filed.

May 18, 1933—Citation on Appeal filed.

July 18, 1933—Motion to Amend and Resettle Final Decree.

July 18, 1933—Order or Decree Amending Final Decree signed.

July 19, 1933—Order or Decree Amending Final Decree filed.

Aug. 10, 1933—Notice of Appeal from Amended Order or Decree filed.

Aug. 10, 1933—Assignments of Error filed.
Aug. 10, 1933—Petition for Leave to Appeal from Amended Order or Decree filed.
Aug. 10, 1933—Order Allowing Appeal signed and filed.
Aug. 10, 1933—Citation issued.
Aug. 16, 1933—Citation filed.

[fol. 3] In United States District Court, Southern District of New York

[Title omitted]

Libel

To the Honorable Judges of the United States District Court for the Southern District of New York:

The libel and complaint of Livingston H. McCrea, in a cause of action civil and maritime, for wages, and penalties, against the United States of America, as owner of the Steamship "American Shipper," her engines, tackle, apparatus, etc., alleges:

Action under special rule for seamen to sue without security or prepayment of fees for the enforcement of the laws of the United States common and statutory for the protection of the health and safety of seamen at sea.

First: That your Libellant is a citizen of the United States and a resident of the City of Ithaca, Tompkins County, State of New York.

[fol. 4] Second: That the Respondent, United States of America is and at all times hereinafter mentioned was a sovereign state.

Third: That the Respondent, United States of America at all times hereinafter mentioned was and now is the owner and operator of the steamship "American Shipper," employed by said Respondent as a merchant vessel, engaged in the common carriage of goods by sea for hire. That said ship "American Shipper" is within the port of New York, Southern District of New York, and is about to proceed to sea.

Fourth: That at all the times hereinafter mentioned your Libellant was a fireman and/or seaman, and this is an action in his name, for his benefit, for wages, and to enforce laws made for his health and safety, and for the health and safety of other seamen and the public.

Fifth: That Libellant elects to have this suit proceed in accordance with the principles applicable to libel in personam pursuant to the Acts of Congress, approved March 9th, 1920, entitled, "An Act Authorizing Suits Against the United States in Admiralty; Suits for Salvage Services, Providing for the Release of Merchant Vessels belonging to the United States from Arrest and Attachment in Foreign Jurisdiction and for other Purposes."

Sixth: That at all the times hereinafter mentioned, the said vessel, "American Shipper," was of more than one [fol. 5] hundred (100) tons gross burden, and that said vessel made a voyage by sea from the Port of New York, State of New York, to the Port of London, Kingdom of Great Britain. That said vessel during said time was not a fishing or whaling vessel or yacht, but, on the contrary, carried merchandise consigned to and shipped by private parties from said Port of New York to said port of London, in the Kingdom of Great Britain.

Seventh: That on or about the 15th day of February, 1928, at said port of New York, said Libellant was hired by the Respondent to serve as a fireman on said vessel "American Shipper," on the voyage from said port of New York, State of New York, to the Port of London, Kingdom of Great Britain, and return to said Port of New York, State of New York, in the United States of America for final discharge, at wages of $65.00 per month; and in pursuance of such hiring, your Libellant signed Articles for said voyage before the United States Shipping Commissioner for the Port of New York, and proceeded on board of said vessel on said voyage hereinafter mentioned from said Port of New York to said Port of London, Kingdom of Great Britain, being a part of the voyage for which said Libellant so signed shipping articles.

Eighth: That said vessel, "American Shipper", carried only ten able seamen and two ordinary seamen on its said [fol. 6] voyage from said Port of New York, State of New

York, to the Port of London, Kingdom of Great Britain; that they carried an additional person as an able seaman although he performed clerical duty only.

Ninth: That on said voyage of said vessel "American Shipper," from said Port of New York, State of New York to the Port of London, Kingdom of Great Britain, which was made by sea, the said ten able seamen and two ordinary seamen on said vessel were not equally divided into watches while at sea for the performance of ordinary work incident to the sailing and management of said vessel; but contrary to the statutes made and provided, six of such ten able seamen were placed on day work from eight a. m. to five p. m. the next day after leaving port, and continued as such until the arrival of said vessel, "American Shipper", in the Port of London, Kingdom of Great Britain, and were off duty from five p. m. until 8 a. m. the following day throughout the voyage; four able seamen and two ordinary seamen were placed in three watches—one ordinary seaman and one able seaman on watch together on two of the watches, and two able seamen on one watch. This left the vessel with no proper lookout and no adequate force to manage and maneuver said vessel. Neither the whole or any part of said crew of said vessel during said time was needed either for the maneuvering of said vessel or for the performance of work necessary for the safety of the crew or vessel or for the safety of life aboard [fol. 7] another vessel or for the performance of fire or lifeboat or other drills, but, on the contrary, the whole of said sailors during said voyage were employed at ordinary work incident to the sailing and management of said vessel. That said vessel carried six firemen, three water tenders and eight oilers. That on said voyage of said vessel, "American Shipper," which was made by sea, the said firemen, water tenders and oilers were not equally divided into watches while at sea for the performance of ordinary work incident to the sailing and management of said vessel; on the contrary, three oilers performed day duty during all of said voyage, and were off duty entirely from five p. m. until eight a. m. the following day throughout the voyage.

That on or about the 22nd day of February, 1928, during said voyage, all of the firemen on the 8 a. m. to twelve noon watch were ordered and compelled by the Respondent, through the Master or other superior officers of the

said vessel "American Shipper" to go on deck to wash rails, bulkheads and booms on the afterwell deck, said firemen being necessarily absent from the fire room and their duties as firemen for a long period of time. That during said period of time, the duty of attending to twenty-four fires as well as properly attending to water in the boilers, was left to one water tender.

Tenth: That by reason of the foregoing and of failure to divide the seamen on said vessel, "American Shipper", [fol. 8] on said voyage, into equal watches, and/or failure to divide the firemen, water tenders and oilers of said vessel into equal watches, your said Libellant, on or about the 26th day of February, 1928, upon the arrival of said vessel "American Shipper" at the Port of London, Kingdom of Great Britain, demanded his discharge from said vessel and the payment of the balance of wages then standing to his credit and one month's additional pay, and that Libellant be provided with adequate employment on board some other vessel to the port from which he originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by your Libellant, or passage back to the United States of America, from the Respondent through the Master of said vesel, also the return of the clothes of said Libellant, which were retained by the Respondent through the Master of said vessel, all of which was refused by the Master of said vessel said Respondent's representative on whom demand as aforesaid was likewise made, whereupon said Libellant left said vessel.

Eleventh: That your Libellant then went to the American Consul in the Port of London, Kingdom of Great Britain, and demanded that the Master of said Vessel "American Shipper", be required to pay him his wages earned, one month's additional wages, that Libellant be provided with adequate employment on board some other vessel to the port from which he originally shipped, or to the most con- [fol. 9] venient port of entry in the United States or to a port agreed upon by your Libellant, or that Libellant be furnished transportation back to the United States, and that said Respondent, through the Master of said Vessel, return the clothes of Libellant to him.

Twelfth: That at that time the Libellant, Livingston H. McCrea, had earned the sum of $25.28 while in the service

of said vessel, no part of which he has received, and neither the whole or any portion of said sum of $25.28, or the additional month's wages amounting to $65.00 has ever been paid, nor was your Libellant furnished transportation back to the United States, nor has the clothes of Libellant, which were wrongfully retained by the Master of said Vessel been returned, although the same was duly demanded.

Thirteenth: That it was dangerous to operate said vessel, "American Shipper" as she was operated as hereinbefore described and with but two seamen on a watch with each of the said three watches, the same being a daily occurrence during said voyage, for the reason that at times it left the vessel with no proper lookout and no adequate force to manage and maneuver said vessel and the voyage of said vessel, "American Shipper", was contrary to the agreement of said Libellant with said defendant, contrary to the statutes made and provided, and said vessel was unseaworthy by reason of said failure to provide proper watches. [fol. 10] That it was dangerous and contrary to the statutes made and provided, to fail to divide the firemen, water tenders, and oilers, into equal watches during said voyage and said vessel was rendered unseaworthy by reason thereof.

That it was dangerous and contrary to the statutes made and provided, to require and cause the firemen on said vessel "American Shipper" to work on the deck of said vessel, washing down rails, bulkheads and booms, and leaving twenty-four fires and the water to the attention of one water tender.

Fourteenth: That by reason of the failure of the Respondent, its servants and representatives, to pay the claim of said Libellant as aforesaid, and to provide said Libellant with adequate employment on board some other vessel to the port from which he originally shipped or to the most convenient port of entry in the United States or to a port agreed upon by your Libellant, or to provide your Libellant with passage back to the United States of America, your Libellant was obliged to pay the sum of $125.00 Dollars for passage back to the Port of New York, State of New York.

Fifteenth: That said Libellant claims to be entitled to the sum of $25.28 Dollars, the amount of wages due Libel-

lant at the time the said vessel "American Shipper" arrived at the Port of London, Kingdom of Great Britain, to [fol. 11] one month's wages amounting to $65.00 Dollars over and above the wages due at the time the said Libellant demanded said wages and left said ship, and the sum of $125.00 Dollars expenses incurred by said Libellant on account of having to secure passage back to the Port of New York, the port from which said Libellant shipped, and the return of the clothes wrongfully retained by the said Respondent through the Master or other Superior Officers of said Vessel "American Shipper", all in accordance with statutes made and provided; also to a sum equal to two days' pay, for each and every day during which said payment of wages was delayed and unpaid, to-wit, from the 15th day of February, 1928, the day upon which demand was made for said wages, up to and including the day when said balance of wages are paid, in accordance with the statutes made and provided.

That all and singular the premises are true and within the admiralty Maritime Jurisdiction of the United States and this Honorable Court.

Wherefore, Libellant prays judgment against said Respondent for the wages due said Libellant on the 26th day of February, 1928, together with one month's additional wages and the amount of expenses incurred by Libellant in securing transportation back to the United States, and the return of the clothes of your Libellant wrongfully retained by the Respondent, and also two days' pay for each of the days the wages due to Libellant are not paid from [fol. 12] the time they were demanded and should have been paid to him and were not paid until the day when the same are paid, in accordance with the decree of this Court, and for such other and further relief as may be proper in the premises.

Gilbert E. Roe, Proctor for Libellant, Office and Post Office Address: No. 55 Liberty Street, Borough of Manhattan, City of New York.

Duly sworn to by Livingston H. McCrea. Jurat omitted in printing.

[fol. 13] IN UNITED STATES DISTRICT COURT

In Admiralty

ANSWER TO LIBEL

99-118

To the Honorable Judges of the United States District Court for the Southern District of New York:

The answer of respondent, United States of America, as owner of the Steamship "American Shipper," to the libel of Livingston H. McCrea, in an alleged cause of action, civil and maritime for wages, alleges upon information and belief and respectfully shows to this Honorable Court as follows:

First: Respondent denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article First of the libel.

Second: Respondent denies the allegations contained in Article Third of the libel.

Third: Respondent admits that the action herein brought by the libellant is for wages alleged to be due, but denies each and every other allegation contained in Article Fourth of the libel.

Fourth: Respondent denies the allegations contained in Article Seventh of the libel, except that it admits that the libellant signed shipping articles for a voyage on the "American Shipper" subject to the terms therein described, and not otherwise.

[fol. 14] Fifth: Respondent denies the allegations contained in Article Eighth of the libel.

Sixth: Respondent denies the allegations contained in Article Ninth of the libel.

Seventh: Respondent denies the allegations contained in Article Tenth of the libel.

Eighth: Respondent denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article Eleventh of the libel.

Ninth: Respondent denies the allegations contained in Article Twelfth of the libel.

Tenth: Respondent denies the allegations contained in Article Thirteenth of the libel.

Eleventh: Respondent denies the allegations contained in Article Fourteenth of the libel.

Twelfth: Respondent denies the allegations contained in Article Fifteenth of the libel, except that it admits that the action is within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Further answering the libel and for a first, separate and complete defense this respondent, upon information and belief, alleges:

[fol. 15] Thirteenth: That the libellant herein who signed shipping articles pursuant to the terms therein specified as alleged in Article Seventh of the libel herein wilfully deserted the ship, the "American Shipper," at the Port of London, and although advised of her time of sailing, refused to rejoin her prior thereto, leaving all of his personal effects aboard the said ship. That said desertion was wilful and followed the refusal of the American Consul in the Port of London, Kingdom of Great Britain, to require the master of the "American Shipper" to discharge him, the American Consul advising him that he was not entitled to said discharge.

Fourteenth: All and singular the premises are true.

Wherefore, respondent prays that the libel herein may be dismissed with costs, and that respondent may have such other and further relief as in the premises may seem proper.

Charles H. Tuttle, U. S. Attorney; Edgar G. Wandless, of Counsel, Proctor for Respondent, Office & P. O. Address: 45 Broadway, Borough of Manhattan, City of New York.

[fol. 16] In United States District Court, Southern District of New York

Admiralty

No. 99-118

Livingston H. McCrea, Plaintiff,

vs.

United States of America, Defendant

Statement of Evidence

Before Hon. John C. Knox, District Judge

New York, May 6, 1932.

Appearances:

John M. Scoble, Esq., Proctor for the Plaintiff.

George Z. Medalie, Esq., United States Attorney, for the Government, by F. H. Cunningham, Esq., Assistant U. S. Attorney.

(Mr. Scoble opens the case on behalf of the plaintiff.)

(Mr. Cunningham opens the case on behalf of the defendant.)

Livingston H. McCrea, plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Scoble:

Mr. Scoble: Do you stipulate that on the 15th day of [fol. 17] February, 1928, the United States of America was the owner of the Steamship "American Shipper"?

Mr. Cunningham: I so stipulate.

Mr. Scoble: Will you stipulate that the home port of the "American Shipper" was the Port of New York?

Mr. Cunningham: I think so, yes.

Mr. Scoble: And that she was in port on the 9th day of July?

Mr. Cunningham: That was the day they sailed out of here.

Q. Mr. McCrea, where do you reside?
A. Newfield, New York.
Q. Did you reside there on the 9th day of July, 1928?
A. I did.
Q. Were you in the City of New York on the 9th day of July, 1928?
A. I was.
Q. Do you know whether or not the steamship "American Shipper" was in port on that day?
A. I do.
Q. Was it?
A. It was.
Q. What was your trade or occupation on the 15th day of February, 1928?
A. A fireman aboard the steamship "American Shipper."
Q. Did you sign shipping articles on board the "American Shipper"?
A. I did.
Q. On what date?
A. On February 15, 1928.
Q. At what wages?
A. $65 a month.
Q. For what voyage?
A. The voyage to London and return to New York.
Q. In that time did you see any sailors signing shipping articles?
A. I did.
Q. How many?
A. There were eleven able-bodied seamen and two ordinary.
[fol. 18] Q. Did they sign the shipping articles in your presence?
A. They did. We were all in the saloon with the shipping commissioner and the captain.
Q. Can you tell how many firemen signed shipping articles on that day?
A. There were six firemen.
Q. How many water tenders?
A. Three.
Q. How many oilers?
A. Eight oilers.
Q. How many engineers?

A. One chief engineer and three assistants.

Q. Mr. McCrea, do you know on that voyage how the sailors were divided in relation to watches?

A. I do.

Q. Will you please state that.

A. There were six sailors divided into three equal watches, two able-bodied seamen on one watch, one able-bodied and one ordinary seaman on one watch, and one able-bodied and one ordinary seaman on the other watch. There were six sailors divided into—worked the day work from eight in the morning to twelve noon; from one to five; there was one man doing yeoman's work.

Q. Was he working day work?

A. He was.

Q. Did you ever see the six men you said were working day work?

A. I did.

Q. When?

A. On two or three occasions at least that I can recollect. We had 9 days going across, and after I came off watch—my watch was 8 to 12, why, we sat on deck in the afternoon, after one o'clock, and I saw the boatswain turn those men to.

[fol. 19] Q. Do you mean the six men?

A. The six men.

What were they *going*?

A. Painting, cleaning the paint work, and various things around the deck.

Q. What deck were they on?

A. On the after well deck, two decks below the bridge, just forward of the stern.

Q. Can you locate that deck in relation to the point where the lookout is kept or the gyropilot is?

A. The lookout is way forward of the bridge, in fact it is on the forecastle head. Where the gyropilot is on this ship, it is amidship, and just above the boat deck, I believe, and these men were aft almost to the stern—two decks below the bridge.

Q. Did you see these six men at any other time?

A. Yes.

Q. Where?

A. I saw them in their rooms at night—visited with them and talked with them.

Q. How many sailors were in the rooms in the forecastle at the time you visited and talked with them?

A. There were ten—the six men on day work and the four men on the other two watches.

Q. Did the man you said was used as a yeoman, did he sleep with the other sailors in the forecastle?

A. I did not see him.

Q. Did you ever see these men at mess?

A. I did.

Q. How many men did you see at mess?

A. I saw eleven men at mess.

Q. State who they were.

[fol. 20] A. The six men on day work, the four men that were on the other two watches, and one man that was supposed to be on watch at meal time. He was at supper with us.

Q. You have stated there were eight oilers; can you state how they were divided in relation to watches?

A. There were three oilers, divided in equal watches in the engine room. There were two oilers with the refrigerating engineer, divided into equal watches in the refrigerator room. There were three oilers working day work from 8 to 12, and one to five, in the engine room and the fireroom, doing various work.

Q. Mr. McCrea, do you know the names of the six men, who were the six oilers who were working day work?

A. I do.

Q. Will you state them.

A. Churchill, Willmer, Conlon, Avery, Shaffer and Leslie.

Q. How did you obtain their names?

A. There was a notice on the bulkhead of the firemen and sailors' mess room that the following men shall do day work on the voyage over, or words to that effect, then their names and, as I remember, "By order of the Captain."

Q. Now, Mr. McCrea, do you remember any time at which the firemen were ordered up to deck, up on the deck?

A. I do.

Q. When was that?

A. On February 22, on the morning watch, 8 to 12.

Q. What was your watch?

A. My watch was 8 to 12.

Q. Were you ordered up on deck at that time?

A. I was.

[fol. 21] Q. Will you state the circumstances?

A. The third assistant told the firemen, the other firemen and myself who were on watch, that we had to go above and clean some paint work which had been spattered with waste oil—that I was to take some kerosene and some rags and go up with the other firemen and do that work. I went up on deck and the other four firemen who were on the other watches had been broken out of their forecastle and turned to do this work with us. I shared some of the rags I brought up and I was instructed to bring up enough, and some of the kerosene that was in the bucket.

Q. How long were you up on deck?

A. About 30 minutes.

Q. Was any fireman in charge of the fires at the time you were on deck?

A. There was not.

Q. How many fires were there?

A. 24 fires, 12 fires in each room.

The Court: You mean the furnaces were deserted when you went up?

The Witness: I do, sir, your Honor.

Q. Now, Mr. McCrea, when did you arrive at the port of London?

A. On February 26.

Q. At that time did you have any talk or conversation with the master?

A. I did.

The Court: Is this boat an oil burner?

The Witness: Yes.

Q. Will you state that conversation.

A. When the men were being issued half of their wages, I went to the Captain in my turn and told the captain that I wanted my discharge, due to the fact that the seamen's [fol. 22] act had been violated by the men not being divided into equal watches, under Section 2 of the Seamen's Act; I also demanded a month's extra wages and transportation back to the United States, under the United States Revised Statutes 4582.

Q. What did the Captain say?

A. The Captain said he would see me at the American Consulate in the morning.

Q. Did he say he would discharge you or not?

A. He said he would not discharge me.

Q. Did you go to the American Consulate's office in the morning?

A. I did.

Q. Did the Captain appear?

A. He did not.

Q. Did they at that time request you to put your charges in writing?

A. They did.

Q. Did you do so?

A. I did.

Q. Did you ever receive any reply from them in relation to your written charges?

A. I did not, although the consul said, he said he would send one.

Q. Did you return to the ship after you had seen the American Consul?

A. I did.

Q. Did you attempt to see the captain?

A. I did.

Q. State what you did.

A. I came aboard the ship and stayed all night, and in the evening when I came aboard I tried to see the master by going to his room and knocking at his door. In the morning after breakfast I tried again. I went to his room and knocked on the door, but I could not see him, I asked the chief mate was he aboard. He said he did not know.

Q. Then what did you do?

A. I then asked the chief mate for a pass for my clothes [fol. 23] off the ship. He said he would not give it to me, or he could not give it to me. I took my clothes and started out, but I was stopped and had to return them to the ship, and then left the ship.

Q. Mr. McCrea, were you ever paid your wages which were due you at that time?

A. I was not.

Q. Were you ever paid any additional month's wages?

A. I was not.

Q. Did you ever secure your clothes?

A. I have not.

Q. When did you return to the United States?

A. I do not remember just the date, but I came to Liverpool and came over from there.

Q. Did you pay your own transportation?

A. I did.

Q. Where did you land?

A. I landed at Boston.

Q. On what ship did you return?

A. I do not remember the ship, but it belonged to the Furness-Withy Company.

Q. Was it the Nova Scotia?

A. The Nova Scotia.

Q. What did that voyage cost you?

A. From Liverpool to New York?

Q. Yes, or from Liverpool to Boston first, and then to New York?

A. About $93.

Q. From Liverpool to Boston?

A. About $93.

Q. How much from Boston to New York?

A. About $8.

Q. Have you ever been repaid that money?

A. I have not.

[fol. 24] Q. Have you computed your wages from the time you made your demand?

A. I have.

Q. How much were they?

A. $25 and some cents.

Q. Have you got a paper with the computation on?

A. I have.

Q. Will you refer to it.

A. (Producing paper) $25.28.

Q. What was your month's wages?

A. $65 a month.

Q. What did you say was the cost of transportation back?

A. $101.

Q. What was the value of your clothes?

A. $40, about.

The Court: Did you ever get your clothes?

The Witness: No, sir, I made an attempt to get them, but they refused to let me get them.

Q. Have you computed the amount due under the statute, two for one?

A. I have.

Q. How much was that?

A. $6510.33.

Q. What is the total amount you claim?

A. $6741.61.

Cross-examination.

By Mr. Cunningham:

Q. You have not that notice containing those names with you?

A. My letter to the American Consul, I kept a copy of it, and it was sent to the American Consul, and I kept a copy, and I believe Mr. Scoble has——

Q. You have not the original notice that you spoke of, have you?

A. The original notice that was posted?

[fol. 25] Q. Yes.

A. No, I have not, that was part of the ship's property.

Q. How did it happen, having taken all the care to master these details that you have mentioned, that you overlooked taking down this notice so that you would have that also to present with this case in the course of time?

A. Do you want me to answer that?

Q. Yes, how did it happen you did not take it?

A. That was part of the ship's property. I had no right to it whatsoever.

Q. Was it tacked up or pasted up?

A. I do not remember whether it was tacked or pasted. It was on the bulkhead of the firemen and sailors' mess room.

Q. How many watches were the members of the deck department divided?

A. Six members of the deck.

Q. I said into how many watches was the deck department divided?

A. Into three watches.

Q. The same number for the engine department, and you state that on the occasion of this cleaning up of the deck which had been smeared with oil, you were ordered up on deck to assist in that work?

A. I was.

Q. And how many firemen were on duty at that time?

A. There were two firemen, one in the after fireroom and myself in the forward.

Q. And they were both ordered up on deck?

A. They were.

Q. And who was in charge of the engine room department, your watch?

A. The third assistant engineer.

[fol. 26] Q. What was his name?

A. I do not recollect it now.

Q. Why, you don't remember the name of the engineer in charge of your watch, Mr. McCrea?

A. Not at this time, no, sir.

Q. You committed to memory, however, the names of these other sailors that you saw posted on the notice, didn't you?

A. I did not.

Q. And you don't remember the name of the engineer in charge?

A. I do not.

Q. And he was the one that ordered you up to do this work and leave all these fires unguarded?

A. He was, sir.

Q. Was it Nielson?

A. Nielson was the first assistant, I believe.

Q. Was he the one in charge of your watch?

A. He was not, the third assistant was in charge of my watch.

Q. Do you remember MacHardy?

A. No, I believe there was a man at that time, an oiler; the name sounds familiar.

Q. Ian S. MacHardy, an oiler, do you remember him?

A. The name sound familiar, yes; I believe he was an oiler.

Q. Was he on the watch with you?

A. I could not tell you that.

Q. Have you read over the depositions taken in this case in which Captain Cumings has testified as to the matters involved and also Mr. Nielsen and Mr. MacHardy?

A. Yes.

Q. Recently?

A. Well, not within a month anyway.

Q. You are therefore familiar with the testimony which [fol. 27] Captain Cumings gave with respect to the assignment of the members of the crew to the watches, aren't you?

A. Yes.

Q. You know what he testified to?

A. I do.

Q. You know it is quite contrary to what you have testified to?

A. I realize that, sir.

Q. When you got to London, as you said, you demanded your pay up to date in full, and the Captain said, "Meet me at the Consulate I will be there tomorrow morning and we will thrash this thing out," did you not?

A. I demanded my discharge and wages in full.

Q. Yes, a discharge and transportation back to the United States, didn't you?

A. Yes.

Q. And the Captain did not oppose you, did he?

A. No.

Q. Let me see, you mentioned two or three sections of the law by number, quite as though you were familiar with them at that time, didn't you?

A. I did.

Q. You said, "I demand this under and by virtue of such and such a section of the shipping law"?

A. I said first that the watches had not been divided equally, and then quoted.

Q. Yes, and you quoted the laws.

A. I did, sir.

Q. And he asked you, or he said to you, did he not, "Why I don't think I know what they are about; I will have to look them up."

A. He said something like that. I do not know his exact words.

Q. And he gave you the address of the American Consulate and said, "I will meet you there tomorrow morning and we will thrash this thing out."

A. He did, after I asked for it.

[fol. 28] Q. You are pretty well familiar with the statutes which safeguard American seamen, aren't you?

A. No, sir, I am not.

Q. You have made a special study of these matters on board the ship?

A. You mean aboard this ship?

Q. Yes.

A. I did not, sir.

Q. How did you come to be so familiar with these particular sections which you have quoted—which you quoted the number of to the Captain, and so forth?

A. There was an article in the Seamen's Journal at that time, or near that date, giving the whole detail of some case that had been decided by the United States Supreme Court.

Q. And from that you got your knowledge and determined that not being quite satisfied with the way the ship was run, you would apply that or demand your discharge pursuant to that, was that it?

A. No, sir.

Q. At any rate, the Captain said to you to meet him up at the Consul's office the next day?

A. He did.

Q. And he gave you the address, I believe, didn't he?

A. After I requested it.

Q. Had you been there before, I mean to London?

A. No, sir, not for some years.

Q. You have relatives somewhere in England, haven't you?

A. No, sir.

Q. Where are your relatives, in Ireland?

A. No.

Q. Have you any relatives at all in England?

A. No, sir.

Q. In Liverpool or any part of England?

A. No.

[fol. 29] Q. You have some friends?

A. I have some friends, in-laws in Birmingham.

Q. Relatives then?

A. They are not blood relatives, no.

Q. If they are relatives by your marriage or whatever it is, they sort of come within that general scope, don't they?

A. Yes.

Q. And you went to see them before you came back, didn't you?

A. The only reason——

Q. I didn't ask you that, I am just asking you if you went to see these relatives?

A. I had to go somewhere.

Mr. Scoble: I object to that as immaterial and irrelevant.

The Court: I will allow it.

Q. Where did they live?

A. Birmingham.

Q. How long did you stay with them?

A. Just as soon as——

Q. How long did you stay with them?

A. Until I got transportation to get back.

Q. How long did you stay with them?

A. I do not remember exactly now. I think about——

Q. When did you leave?

The Court: You think about what?

The Witness: About three weeks.

Q. When did you leave the ship?

A. I think it was February 28.

Q. And you spent some three weeks with them and then took passage back on the Nova Scotia?

A. Yes, I had to stay there until I could get money.

The Court: Where did you get the money?

[fol. 30] The Witness: I wired to friends in America.

Q. Did you try to get a ship?

A. I knew it was useless to get a ship.

Q. I didn't ask you whether it was useless, did you get a ship?

A. I did not dare try to get a ship.

Q. Why?

A. I was threatened with arrest by the American Consul.

Q. Why?

A. As being a deserter.

Q. You went up to the American Consul's office the next morning and got there around noon?

A. On the 27th I got there around nine or ten o'clock.

Q. What time did the Captain say to you on the day before, when this whole matter started, that he would be up there, around noon or the next morning?

A. He said he would meet me there in the morning.

Q. So you went up there and got there, say, around half past nine. How long did you stay there?

A. Pretty near two hours.

Q. So you left about half past eleven. Have you been going to sea a good deal, Mr. McCrea?

A. I have.

Q. You are pretty familiar with ships and the manner in which they are run, and the general business of ships and their officers?

A. In the last six years——

Q. Just yes or no.

A. No.

Q. You know that when a captain gets to port he has considerable ship's business to do with the authorities, does he not, usually on the day of landing?

[fol. 31] A. Why, he is commander of the ship.

Q. He has business with the customs and business usually with his agents, and he is a rather busy person, as a matter of fact, particularly during the first day, isn't he—frankly, isn't he?

A. Yes.

Q. So that when he told you to meet him at the American Consulate and you only waited until half past eleven, why, you did not wait until he came, did you?

A. I left the American Consulate because I was practically told to leave.

Q. At any rate, you did not wait until Captain Cumings came there, as he said he would meet you the next day, you did not wait for him?

A. I was told I could not see Captain Cumings.

The Court: Who told you that?

The Witness: The American Consul.

Q. The American Consul had not come there yet, had he?

A. I could not tell you that.

The Court: What reason did he tell you you could not see him?

The Witness: I do not know, your Honor, I asked to see see the captain and he said, "You cannot see him."

Q. Mr. McCrea, why would any American Consular office tell you that you could not see the master of your ship when you told him, as I suppose you did, that you came up

there by appointment to see him, to consult with him; can you think of any reason?

A. Do you want me to give a reason?

Q. Yes, certainly, any reason you think of.

A. My experience in the past with American Consuls [fol. 32] has been that they are also busy men and they want to get rid of seamen just as soon as they can and if they do not—if they in their mind do not think that the case deserves attention, that they would care to give it, why, we are dismissed.

Q. You dealt with Mr. Pinkerton and Mr. Miller, did you, at the American Consulate?

A. Yes.

Q. They treated you courteously, didn't they?

A. Part of the time, yes.

Q. After you had laid before them the basis—the gist of your theory of your discharge, they told you they did not think there was anything to it, didn't they?

A. I had considerable trouble trying to lay it before them.

Q. But you did lay it before them?

A. I did.

Q. And they did not take the view that you took, isn't that so?

A. That is so.

Q. And they said, "Well, you can go back and address this to us in writing"?

A. They asked me——

Q. H'm?

A. I asked them for their statement in writing first. They said they would give it, providing I give them a statement in writing.

Q. So you did go back and you did send them a statement?

A. I did.

Q. And that statement is attached to the commission, is it not?

A. Their testimony was taken.

The Court: Well, that statement is on file here.

Q. Now, you know, do you not, Mr. McCrea, that the master of a ship cannot discharge a seaman upon his re- [fol. 33] quest, without the consent of the American Consul, in foreign ports, don't you?

A. I understood that the master had a right to discharge a seaman whether in a foreign port or where, providing the charge was just.

Q. In the absence of acquiescence by the American Consul?

A. Well, it was up to the captain, not the American Consul.

Q. Mr. McCrea, don't you know that when you signed the articles for a trip, a round trip, as this was, that if the captain wished to discharge you at London without your consent that it would be impossible without the acquiescence and approval of the American Consul?

A. That would be, yes.

Q. All right, that is when the captain wants to discharge you. Now, if you want to be discharged and the captain says, "Yes, I will agree to it", don't you know that you must in addition to that go before the American Consul and get the approval of the American Consul first before the captain can do what you and he want to do?

A. I don't know that.

Q. You did not know it then either?

A. No. Can I make myself clear on that?

Q. I think you did.

A. Yes.

Q. Don't you know as a matter of fact that the Captain of the "American Shipper" could do nothing with respect to your request in the absence of approval by the American Consul?

A. Under these——

Q. I just ask you whether you knew that or not.

A. I would like to explain.

Q. I will give you an opportunity. I just ask you now [fol. 34] whether you knew it.

A. I don't think I did.

Q. Didn't you know that the American Captain's hands were completely tied up without the approval of the American Consul?

A. No.

Q. Didn't you know that before a man could be discharged in London that the American Consul would have to get the approval of the British immigration authorities to such discharge?

A. I thought that the captain would have to.

Q. But you did know before such a discharge could be made, that there would be the necessity of an approval by the British immigration authorities, didn't you?

A. Not until I got over there.

Q. Well, you learned it from the American Consul and from Pinkerton and Miller, didn't you, in your conversation there?

A. I did.

Q. And that is the reason why you were keeping out of reach, for fear you would be arrested while you were in England, wasn't it, because you knew you were there against the immigration laws of Great Britain, isn't that so?

A. Yes.

Q. When you left the American Consulate and went back to the ship and you say you tried to see the captain and you were not able to, you went to his room that night?

A. Yes.

Q. And as a matter of fact you do not know whether he came back on the ship until late that night, do you?

A. No.

Q. He may have been in his room when you went there or he may not have been, just as the fact might be, isn't that true?

A. I knocked very loudly.

[fol. 35] Q. You read his testimony, and if I recollect he says he returned to the ship late that night, around 12 o'clock, so it is possible when you did knock on his door, and I do not doubt that you did, that he had not returned yet to the ship. Now, the next day you say you went there again and you did not succeed in seeing him.

A. The next morning very early.

Q. Do you know how it was that you did not happen to arouse him then?

A. I could not tell you.

Q. He did not send word to you refusing to see you, did he; there was not any refusal, I mean, you just did not have the good luck to connect up, wasn't that it?

A. I did not have the good luck to bring him to the door.

Q. Well, at any rate, he did not send out word, "I don't want to see this man McCrea," did he?

A. No.

Q. So, for all you know, when you got there and went to his room, he might have been in some other part of the

ship. The fact is that you say you tried to see him on the Monday that you were there, and then on the Tuesday morning, and you did not succeed?

A. He could not have been in any other part of the ship, except the officers' quarters, because I looked the ship over to try to find the captain.

Q. At any rate, you did not have any further talk with the captain?

A. No.

Q. And when he testifies that when he said to you to meet him at the American Consul's office tomorrow morning at [fol. 36] such and such a time, to this day you have never seen him again?

A. I have not.

Q. Then you attempted to leave the ship with all your belongings, and you say you asked for a pass and you were refused it?

A. I was.

Q. Then did you tell them why you wanted to go ashore?

A. I told them I was leaving the ship.

Q. Who did you say this to?

A. The chief mate, that I was leaving the ship, that I would like to have a pass for my clothes.

Q. In other words, you told him you were quitting?

A. I told him I was quitting.

Q. When you told him you were quitting, did you——

A. It meant that I was quitting.

Q. That you were not coming back?

A. Yes, it meant that.

Q. You were not concealing from him anything?

A. No, no, I had nothing to conceal.

Q. You were entirely frank in all this thing; you took the position that the laws protecting me have been violated, and I am leaving?

A. Not the laws protecting me, but the laws of the safety of life at sea.

Q. I understand, but the statutes had been violated and therefore you were leaving the ship?

A. Yes.

Q. And the first mate or the chief officer refused you a pass, refused to allow you to remove your belongings from the ship, whereupon you left them and left the ship?

A. Yes.

Q. That was on Tuesday, wasn't it?

A. Monday or Tuesday, I forget.

[fol. 37] Q. It was the day after you were at the American Consul's office?

A. Yes.

Q. You knew when that ship was to sail, didn't you?

A. The American Consul so advised me.

Q. You knew it was going to sail the following Friday or Saturday. Did you make any effort to rejoin your ship?

A. No.

Q. It sailed with your knowledge it was sailing at that time?

A. It did.

Q. And you wilfully refrained from rejoining the ship in accordance with the shipping articles that you had signed?

A. The contract had been violated and therefore I had a right to leave the ship.

Q. I say, you were not left ashore by accident?

A. No, I was not.

Q. You simply refused to rejoin the ship?

A. Yes.

Q. And you had not been discharged by the captain?

A. No.

Q. You had not been discharged by the American Consul, had you?

A. No.

Redirect examination.

By Mr. Scoble:

Q. Mr. Cunningham has inquired in relation to how you remembered the names of the sailors who were on day duty. At the time you made your complaint to the American Consul, did you give him a statement giving the names of those men?

A. I did.

Q. Did you keep a copy of it?

A. I did.

Q. Is that a copy (handing paper)?

A. That is a copy.

[fol. 38] Mr. Scoble: I offer this in evidence.

Mr. Cunningham: I object to the production of that as a copy. I object to its being received in evidence.

The Court: Oh, I will take it as tending to support his statement as to how he recalls these names, solely for that purpose.

(Marked Libellant's Exhibit 1.)

Q. Is it on account of that copy of the statement you say you delivered to the American Consul, that you recall the names of these men?

A. Yes.

Q. In relation to the date when the men were ordered up on deck to clean the deck, was that in the morning or in the evening?

A. In the morning.

Q. On the 8 to 12 watch?

A. On the 8 to 12 watch.

The Court: Had you dumped the oil?

The Witness: No, sir.

The Court: Had some of your watch dumped it?

The Witness: I could not tell you that, sir.

The Court: When was it dumped, do you know?

The Witness: I could not tell you.

Recross-examination.

By Mr. Cunningham:

Q. As a matter of fact, the oil which causes such a mussing up of the deck is usually dumped by the previous watch, [fol. 39] is it not, because it has collected at the end of their watch, isn't that the fact?

A. Each watch dumps their own oil.

Q. And that oil is collected at the end of the watch?

A. That is collected at the end of the watch.

Q. In other words, they give a clean condition for the watch?

A. Yes.

Q. For the watch which is following them, as far as possible, in respect to that matter?

A. We leave our stations in good order.

Q. Since your return to the States, have you been going to sea?

A. I tried to once, but was unable to. I passed an examination with the United States Engineers Department as

an engineer, a Civil Service examination, but due to the fact I could not report in time I lost the position.

Q. But you have made no voyages since this particular one?

A. No.

Q. You are living up at Newfield, New York?

A. At the present time I am living in New York City, looking for work.

Q. But your home is in Newfield, New York?

A. Newfield, New York.

Q. That is right near Ithaca, isn't it?

A. Yes.

Mr. Scoble: I offer in evidence the following questions and answers taken from the deposition of Schuyler F. Cumings, Skipper of the Steamship Leviathan, taken on behalf of the respondent, on the 3rd day of February, 1932.

Mr. Cunningham: Just what are you doing?

Mr. Scoble: I am going to read in some of it.

[fol. 40] Mr. Cunningham: I am going to offer the entire deposition. I do not know of any special reason why you should pick out particular questions now.

Mr. Scoble: To corroborate the testimony. Our contention is going to be that even taking the testimony of the captain, that the statute was violated.

The Court: All right, go ahead.

Mr. Scoble: Oh, I would just like to ask Mr. McCrea one more question.

By Mr. Scoble:

Q. During any time of the voyage was there any emergency which arose, which required the use of the entire ship's crew to be called?

A. No.

The Court: To save time I think you might stipulate—well, you want to specify certain portions of the captain's statement?

Mr. Cunningham: I do not want in any way to interfere with the orderly procedure of presentation of Mr. Scoble's case, but if he is just going to select from the deposition which the respondent has taken of Captain Cumings, certain questions, it seems to me that those could be more or

less emphasized in a memorandum or argument to the court, instead of cluttering up the record.

The Court: How many of them are there?

Mr. Scoble: Probably 15 or 20. I would consent to the [fol. 41] putting of the whole deposition in evidence, except there are three or four questions in the deposition I want to object to.

(Discussion off the record.)

Mr. Scoble: The following are the questions and answers I want to read from the deposition.

"Q. Captain, what is your occupation?
"A. Master mariner."

This is page 34:

"Q. Were you the master of the "American Shipper" during the period from February 15, 1928, to February 26, 1928?
"A. I was."

Then I will skip three questions.

"Q. Now, on the voyage which left New York February 16, 1928, en route for London and return, do you remember a man by the name of Livingston H. McCrea being a member of the crew?
"A. I do.
"Q. What was his job?
"A. Fireman.
"Q. Where did he sign on?
"A. At the port of New York.
"Q. Did he sign on for the round voyage?
"A. He signed on for the round voyage, yes.
"Q. Did you ever have any trouble with McCrea on the voyage going over?
"A. Not on the voyage going over.
"Q. As far as his attention to duties and so forth are concerned, you never personally had any trouble with him?
"A. Not at all.
"Q. When the ship got to London did you see McCrea?
"A. I did.
[fol. 42] "Q. State what happened at that time?

"A. Well, while advancing pay due to the crew of the steamer "American Shipper" in the port of London on the day of arrival, McCrea demanded that he receive his full amount due him.

"Q. And when McCrea came along you say he demanded the full amount that was due him at that time?

"A. The full amount he had earned at that time."

Page 36:

"Q. And when he demanded the full amount due him at that time, what did you do?

"A. I asked him his reason.

"Q. What did he say?

"A. He quoted Section 2 of the Seamen's Act, and Revised Statutes 4583, merely by their titles, so I told him he would have to see me at the American Consul's.

"Q. At any rate you did not give him the amount which he demanded?

"A. I did not give him anything. He would not accept half his pay."

Page 38:

"Q. Did he at the time of making the demand give any explanation of his demand whatever?

"A. None at all.

"Q. That is all he said, gave the reference to Section 2 of the Seamen's Act and so forth?

"A. The titles.

"Q. And the section of the Revised Statutes?

"A. That is all."

Page 41:

"Q. Now, Captain, Mr. McCrea has brought an action against the United States of America, as owner of the ves- [fol. 43] sel, claiming the amount of wages due him at the time of arrival in London, in the sum of $25.28; and also in addition a month's wages amounting to $65 above the wages mentioned as due, and the sum of $125 for expenses alleged to have been incurred by him for the purchase of passage back to New York from London, and also for the return of the clothing which he claims was wrongfully retained by the respondent, through the master or other of-

ficers, said claim being based on what he claims was a violation of law in reference to the way in which the watches were arranged on board the ship. He states that contrary to statute, the watches both in the deck department and in the engine department were improperly arranged. He states that there were ten able seamen and two ordinary seamen on the vessel at the time. Can you state whether that statement is correct or not?

"A. That statement is not correct.

"Q. Why?

"A. We had eleven able-bodied seamen and two ordinary seamen.

"Q. He states that contrary to the statutes these men were not equally divided into watches, but that six of the able seamen were placed on day work from eight to five daily; is that true?

"A. I don't know what he refers to by day work. We had three men on each watch; and then we had a storekeeper; we had a yeoman, and we had another man.

"Q. How were the watches divided?

"A. The watches were four on and eight off.

[fol. 44] "Q. So that one watch was served from 12 to 4 and another one from 4 to 8?

"A. Yes, sir.

"Q. And a third watch?

"A. From 8 to 12."

Page 45, the last two questions:

"Q. Did you in addition to those who were on the regular watches during the day time from 8 to 12 and 12 to 4 have any other than the three whom you have described as being on watch on duty in deck work?

"A. Yes, sir.

"Q. Will you tell us about them?

"A. There was a carpenter; there was a boatswain; a seaman about decks there was a deck watchman, and performing his eight hours out of the twenty-four. There was a man performing various duties, including those of yeoman, during the time that he was performing his eight hours out of twenty-four; there was a man who had charge of the store rooms, keeping the various watches supplied with what materials they might need from the ship's stores and performing eight hours out of twenty-four.

"Q. What can you say, Captain Cumings, in reference to this statement that six of the ten able seamen were placed on day work from eight to five the day after leaving port and continued as such until the arrival in London; were these men he refers to those which you have just mentioned, or part of them?

"A. He might have been mistaken, having seen men around deck. I don't know where he gets his information from. I don't know what he is thinking of. We have men there. There are three men on a watch. There are three [fol. 45] men on a watch, day time as well as night time. We also have other men. There is a boatswain, a carpenter, and, as I have stated, three other seamen employed at different times about the decks."

Page 49:

"Q. Now, you have stated that you carried, I think you said, eleven men.

"A. Eleven able seamen.

"Q. And two ordinary seamen?

"A. Ordinary seamen.

"Q. Is it not a fact that one of the able-bodied seamen was used in clerical duties all the time?

"A. Not all the time.

"Q. But at the time he was doing his watches he was used in clerical duties?

"A. He was sometimes used for clerical duties, and sometimes used for other duties about the ship. These duties that he performed were duties incidental to the navigation of the ship."

Page 50:

"Q. Was the whole or any part of the crew during said voyage needed for the maneuvering of the vessel or performance of work necessary for the safety of the crew or vessel, or for the safety of life aboard another vessel, or for life boat, fire or other drills?

"A. I don't understand your question.

"(Question repeated.)

"The Witness: Were they needed? I don't understand your question.

"Mr. Scoble: All I am asking is whether any emergency [fol. 46] ever came up by which it became necessary to do that on that voyage.

"The Witness: There was no emergency. We held our fire and boat drills as called for by law."

Bottom of page 51:

"Q. While the men were on watch did not one of them at various times have to call the next watch, and also get coffee for the officer on watch?

"A. He had to call the next watch, his relief, and the relief of the others that were on duty at that time, but he never had to wait on the officers as personal servants of any character."

OFFERS IN EVIDENCE

The libellant rests.

Mr. Cunningham: Mr. Scoble, will you consent to the introduction in evidence of a photostatic cpoy of page 14 of the official log of this voyage, after having compared it with the official log?

Mr. Scoble: Yes.

Mr. Cunningham: I offer in evidence page 14 of the official log of the steamship "American Shipper". In lieu of the original, that is, the official log itself, which is on file with the Commissioner, a photostatic copy is offered by the respondent, with the consent of counsel.

Mr. Scoble: I object to this as incompetent, irrelevant and immaterial, and as a self-serving declaration. The reason for the objection is that they state in that that he [fol. 47] was a deserter. Now, our claim is that under the statute he was not a deserter, and it may go to the very bottom of this case.

The Court: I will take it simply as a contemporary entry in the official record of the ship of the Captain's version of this transaction.

(Marked Respondent's Exhibit A.)

Mr. Cunningham: I will offer in evidence photostatic copy of the United States Certificate of Inspection of the Steamship "American Shipper", which was issued by the

authorities of the Department of Commerce and which would expire on February 25, 1928. In other words, this voyage was begun somewhere around February 20, 1928, and this certificate was still in effect covering the ship.

Mr. Scoble: I have no objection to make on account of it being a photostatic copy of the certificate. I do object to it on the ground that it is immaterial, irrelevant and incompetent. The United States Court of Appeals has held that the fact that the vessel carries a larger crew than is required by its certificate of inspection, is not material in relation to this statute.

The Court: I will take it for whatever it is worth.

(Marked Respondent's Exhibit B.)

[fol. 48] WALTER N. ELLIOTT, called as a witness on behalf of the respondent, being duly sworn, testified as follows:

Direct examination.

By Mr. Cunningham:

Q. What is your business—who are you connected with?

A. I am clerk of the files of the U. S. Shipping Commissioner's office in New York City.

Q. Did you on receipt of a subpœna produce in court this book which I hand you?

A. I did.

Q. What book is that?

A. That is the official release book of the various ships that are paid off between the dates as shown on the book.

Q. How is this book made up?

A. This book is made up by the Shipping Commissioner when he pays off the ship. He goes aboard the ship and pays off the crew and as each man is paid off he signs his name alongside of his rating, acknowledging the amount of money.

Q. Does that book include the payoff of the Steamship "American Shipper" for the voyage which ended in New York directly subsequent to February 28, 1928?

A. It does.

Q. When the men are paid off, do they sign the book?

A. Yes.

Q. Where a man has been logged as a deserter, what is done by the Shipping Commissioner with respect to any

wages which may have been earned by him or may have been due him at the time of his desertion?

A. The Commissioner makes the entry in the book alongside of the proper rating, to fill up the vacancy in the rating which would occur——

[fol. 49] Q. And the name of that particular man is written in by the Shipping Commissioner?

A. Yes.

Q. And is it written in in a different colored ink, as a rule?

A. As a rule they usually write it in red ink.

Mr. Cunningham: I offer in evidence page 288. That is the only page that shows the record of McCrea as a deserter by the Shipping Commissioner.

Mr. Scoble: I object to it as incompetent, irrelevant and immaterial.

The Court: I do not think it has any bearing upon it.

Mr. Cunningham: I will withdraw it. I do not think there is any use of overburdening the record on a thing there is not very much dispute about. He claims he was not a deserter and we claim that he was.

Now I offer on behalf of the respondent the deposition taken upon notice, of the testimony of Captain Schuyler F. Cumings, taken on February 3, 1932.

Mr. Scoble: I want to expedite the hearing, but Mr. Cunningham is offering the whole deposition in evidence now. If I could put on the record an objection to two questions here.

The Court: Very well.

Mr. Scoble: I object to the question on page 40—"when you came back to New York, did you make a report of his not returning on the ship? A. I had to report his absence from the crew." I move to strike out the answer as [fol. 50] not responsive, and also as a matter of opinion.

The Court: That is simply his view of what he had to do, in view of the fact that the man was not there. I don't think it makes any difference one way or the other.

Mr. Scoble:

"Q. Your report was one of what?

"A. One of desertion; that was the only one I could make for a man missing as he was."

I move to strike out the answer.

The Court: All right, I will grant your motion.

Mr. Cunningham: Do you strike out his whole answer? His question was, "Your report was one——"

Mr. Scoble: "One of desertion."

Mr. Cunningham: There is certainly nothing to be stricken out in that part of the answer.

The Court: He simply tells what he did.

Mr. Cunningham: Then the rest of it was "that is the only one I could make."

The Court: Strike that out.

Mr. Scoble:

"Q. And he was logged there on the ship's log as a deserter?

"A. Yes, and his pay was stopped from the time he was last seen aboard ship."

I move to strike out the answer.

The Court: I will exclude that.

Deposition of Schuyler F. Cumings marked Respondent's Exhibit C.)

Mr. Cunningham: I now offer in evidence the deposition [fol. 51] under notice on November 2, 1931, of Paul C. Nielsen, who was first assistant engineer of the steamship "American Shipper" during the year 1928, and also the deposition taken on February 19, 1931, of Ian S. Machardy, an oiler at that time on the steamship "American Shipper."

(Marked Respondent's Exhibit D.)

Mr. Cunningham: I offer also in evidence on behalf of the respondent the testimony taken by commission, issued out of this court, under date of January 2, 1929, and under order signed December 20, 1928, of Lowell C. Pinkerton, Consul General at London, England, and Daniel Miller, Vice-Consul. I am offering in evidence this commission, with the interrogatories and cross interrogatories and the answers and all exhibits thereto attached as received in due course under the commission.

Mr. Scoble: I would like to object to the seventh interrogatory in the deposition of Daniel Miller.

The Court: What is that?

Mr. Scoble:

"Q. What is your authority under the United States governing the discharge of seamen?"

I object to that as immaterial and calling for a conclusion, in that the statutes themselves are the best evidence.

The Court: Objection sustained.

(Marked Respondent's Exhibit E.)

Mr. Cunningham: The defendant rests.

[fol. 52] RESPONDENT'S EXHIBIT "C"—DEPOSITION OF SCHUYLER F. CUMINGS

IN UNITED STATES DISTRICT COURT

[Title omitted]

Deposition of Schuyler F. Cumings, Chief Shipkeeper, S. S. Leviathan, taken on behalf of the Respondent, United States of America, at the office of the United States Shipping Board, 45 Broadway, New York City, before John F. Frazer, Notary Public, pursuant to notice, on February 3, 1932, at 4 P. M.

Appearances:

George Z. Medalie, Esq., United States Attorney, for the Respondent, United States of America, by Frederick H. Cunningham, Esq., of Counsel.

John M. Scoble, Esq., Proctor for Libellant.

[fol. 53] It is stipulated that this deposition may be taken by a stenographer, signing, filing and certification being hereby waved, copy to be served on the proctor for the libellant, and stenographer's fees taxable as costs.

It is further stipulated that all objections except as to the form of the questions are reserved for the trial.

SCHUYLER F. CUMINGS, a witness called on behalf of the respondent after first being duly sworn, testified as follows:

Direct examination.

By Mr. Cunningham:

Q. Captain, what is your occupation?
A. Master mariner.
Q. How long have you been following the sea?
A. Since 1907. I was a cadet on a school ship then.
Q. What ship are you connected with at the present time?
A. At the present I am chief shipkeeper on the Steamship Leviathan.
Q. And prior to your connection with the Leviathan what ship were you connected with?
A. I was master of the Steamship President Harding.
Q. And prior to that what ship were you connected with?
A. I was master of the Steamship "American Shipper."
Q. Were you the master of the "American Shipper" [fol. 54] during the period from February 13, 1928, to February 26, 1928?
A. I was.
Q. And for some period longer?
A. Yes, sir.
Q. What was the length of your connection with that ship?
A. Close on to five years.
Q. How long were you connected with the "American Shipper" and between what dates?
A. Approximately five years; between March, 1924, and the first of April, 1930.
Q. Were you master during all that time?
A. I was master during all the time with the exception of short periods of maybe two months at a time when I was master of the American Merchant and master of the American Trader.
Q. Now, on the voyage which left New York February 16, 1928, enroute for London and return, do you remember a man by the name of Livingston H. McCrea being a member of the crew?
A. I do.
Q. What was his job?
A. Fireman.
Q. Where did he sign on?
A. At the port of New York.

Q. Did he sign on for the round voyage?

A. He signed on for the round voyage, yes.

Q. Did you ever have any trouble with McCrea on the voyage going over?

A. Not on the voyage going over.

Q. As far as his attention to duties and so forth are concerned you never personally had any trouble with him?

A. Not at all.

[fol. 55] Q. Nor did you have any complaint of any trouble with him, did you, as a matter of fact?

A. No, sir; no complaints either from him or against him.

Q. When the ship got to London did you see McCrea?

A. I did.

Q. State what happened at that time?

A. Well, while advancing pay due to the crew of the steamer "American Shipper" in the port of London on the day of arrival, McCrea demanded that he receive his full amount due him.

Q. Just a minute. On arrival how much pay is due the members of the crew?

A. One-half of what they have earned.

Q. That is, they are entitled to demand half of the wages earned up to date?

A. They are entitled to half of the wages up to date, yes.

Q. And when McCrea came along you say he demanded the full amount that was due him at that time?

A. The full amount he had earned at that time.

Q. Were there other members of the crew on the line at the time getting their allowances?

A. Yes, sir.

Q. And when he demanded the full amount due him at that time, what did you do?

A. I asked him his reason.

Q. What did he say?

A. He quoted Section 2 of the Seamen's Act, the Revised Statutes 4583, merely by their titles, so I told him he would have to see me at the American Consul's.

Q. Did you refuse to give him the amount of his demand?

[fol. 56] A. I refused him nothing at that time. I simply told him that he would have to see me at the American Consul's.

Q. At any rate you did not give him the amount which he demanded?

A. I did not give him anything. He would not accept half his pay.

Q. You told him he could have half?

A. I told him he could have half.

Q. Did he insist upon the full amount?

A. He just simply made no further argument about it. At that time he asked me the directions to the American Consulate, how to get there, and I told him. I gave him those directions.

Q. When you told him he could not have the total amount due at that time, what further did you tell him?

A. I told him to see me at the American Consul's.

Q. And you just said that you gave him directions how to reach there?

A. I gave him directions how to reach there, yes.

Q. Did you tell him when to meet you there?

A. I told him I would be there some time just after noon on Monday.

Q. Did this occur on a Sunday?

A. This occurred on a Sunday.

Q. Do you remember the date?

A. I cannot recall the exact date right now. Sunday was the day we arrived.

Mr. Cunningham: It is conceded that the ship arrived at London on February 26, 1928.

Mr. Scoble: Yes.

Q. The ship arrived on Sunday, did it not?

A. On a Sunday, yes.

[fol. 57] Q. The next morning, Monday, did you go to the American Consul's?

A. Not in the morning. I had the duty of preparing my papers for entry at the Customs House; and it was after I had entered at the Customs House that I proceeded to the Consulate.

Q. What time did you get there, about?

A. I could not tell you exactly, but it was before 2 o'clock in the afternoon.

Q. Had you told Mr. McCrea that you would be there at any specific hour?

A. Not at any specific hour. I told him I would not be there before noon, but that I would be there some time not long after noon.

Q. When you got there was he there?

A. He was not.

Q. Did you make any inquiries at the Consulate as to whether he had been there?

A. I did.

Q. And what was told you?

A. I was told that he had been there and that he had gone; that he had left.

Q. Who was it who told you that?

A. Mr. Miller.

Q. Who is Mr. Miller?

A. He is Vice-Consul in charge of the Marine Division.

Q. When you finished at the American Consulate that afternoon did you return to the ship?

A. I returned to the ship late. The time I finished at the Consulate and then proceeded down to our office, and had supper uptown, and got back aboard the ship along about 8 o'clock, I imagine.

[fol. 58] Q. Did you see Mr. McCrea yourself personally again at all?

A. Not again. I have never seen him to this day.

Q. So you had—what you just told us comprises all your dealings with him in reference to this matter of his request for full payment of his wages on arrival at the port of London?

A. That is true.

Q. Did he at the time of making the demand give any explanation of his demand whatever?

A. None at all.

Q. That is all he said, gave the reference to Section 2 of the Seamen's Act and so forth?

A. The titles.

Q. And the section of the Revised Statutes?

A. That is all.

Q. Had you had any complaint from him during the voyage?

A. None at all.

Q. Had any complaint been made to any of the officers of the Engine Department which in turn came to you?

A. None to my knowledge.

Q. Such complaints would come to you, would they not?

A. As a general rule, they would. I say, as a general

rule, because it is the policy of the engineers to bring any complaint like that to my attention.

Q. Of course, a complaint by a member of the engine force would be made to the chief engineer?

A. To the chief engineer.

Q. Do you remember when you sailed from London on the return trip?

A. On the return trip, if I recall properly, on a Friday night, the following Friday night after arrival.

[fol. 59] Q. And when the ship sailed did Mr. McCrea report for duty?

A. He did not.

Q. And you never saw him on the ship again?

A. I never saw him from the time he left the ship on Sunday. That is, I did not see him from the time he made his demand for full payment on Sunday.

Q. When you came back to New York, did you make a report of his not returning on the ship?

A. I had to report his absence from the crew.

Q. Your report was one of what?

A. One of desertion; that was the only one I could make for a man missing as he was.

Mr. Scoble: I want to expedite the hearing, but Mr. Cumings is offering the whole deposition in evidence, now. If I could put on the record an objection to two questions here.

The Court: Very well.

Mr. Scoble:

"Q. Your report was one of what?

"A. One of desertion; that was the only one I could make for a man missing as he was."

I move to strike out the answer.

The Court: All right, I will grant your motion.

Mr. Cunningham: Do you strike out his whole answer? His question was, "Your report was one——"

Mr. Scoble: "One of desertion."

Mr. Cunningham: There is certainly nothing to be stricken out in that part of the answer.

[fol. 60] The Court: He simply tells what he did.

Mr. Cunningham: Then the rest of it was "that is the only one I could make."

The Court: Strike that out.

Q. And he was logged there on the ship's log as a deserter?

A. Yes, and his pay was stopped from the time he was last seen aboard ship.

Mr. Scoble:

"Q. And he was logged there on the ship's log as a deserter?

"A. Yes, and his pay was stopped from the time he was last seen aboard ship."

I move to strike out the answer.

The Court: I will exclude that.

Q. Do you know whether McCrea left his clothing on board ship?

A. Yes, he did.

Q. Do you know what was done with his clothing when the ship arrived in New York?

A. It was turned over to the United States Shipping Commissioner.

Q. That was coincident with his being reported as a deserter to the United States Shipping Commissioner here?

A. Yes, sir.

Q. Did you go back to the American Consulate at all after this first appearance there by you on Monday?

A. Yes, sir.

Q. How many times?

A. Once after that.

Q. What day was that, do you remember?

A. That was a Friday, the morning or the day of sailing when I cleared and got my papers.

Q. Were you told whether or not Mr. McCrea had been back to the Consulate again?

[fol. 61] A. I am not certain, but it seems to me that I was told that he had been there or had sent a letter of complaint to the Consul, or had had some communication with the Consul.

Q. Were you on board the ship every day while the ship was in port?

A. Every day I was on board the ship while she was in port, sleeping aboard there every night.

Q. How late did you stay on board each morning?

A. Until after 10 o'clock.

Q. Were you there in the afternoon at all?

A. Very often. Some days I spent the whole day there.

Q. And, as you have already stated, you never saw Mr. McCrea again?

A. I never saw him again.

Q. Now, Captain, Mr. McCrea has brought an action against the United States of America, as owner of the vessel, claiming the amount of wages due him at the time of arrival in London, in the sum of $25.28; and also in addition a month's wages amounting to $65 above the wages mentioned as due, and the sum of $125 for expenses alleged to have been incurred by him for the purchase of passage back to New York from London, and also for the return of the clothing which he claims was wrongfully retained by the respondent, through the master or other officers, said claim being based on what he claims was a violation of law in reference to the way in which the watches were arranged on board the ship. He states that contrary to statute, the [fol. 62] watches both in the deck department and in the engine department were improperly arranged. He states that there were ten able seamen and two ordinary seamen on the vessel at the time. Can you state whether that statement is correct or not?

A. That statement is not correct.

Q. Why?

A. We had eleven able bodied seamen and two ordinary seamen.

Q. He states that contrary to the statutes these men were not equally divided into watches, but that six of the able seamen were placed on day work from eight to five daily; is that true?

A. I don't know what he refers to by day work. We had three men on each watch; and then we had a storekeeper; we had a yeoman, and we had another man.

Q. How were the watches divided?

A. The watches were four on and eight off.

Q. So that one watch was served from 12 to 4 and another one from 4 to 8?

A. Yes, sir.

Q. And a third watch?

A. From 8 to 12.

Q. How many men were on watch in the deck department on these respective watches mentioned?

A. There were three men.

Q. Mr. McCrea says, Captain, that these watches were made up of only two men on each watch, one of them being composed of an ordinary seaman and an able seaman; another of an ordinary seaman and an able seaman, and a third of two able seamen. You have just stated that there were three men on watch instead of two, as he alleges. [fol. 63] Will you explain that to us a little more, and state whether Mr. McCrea's figures are correct or not?

A. Mr. McCrea's figures are entirely wrong.

Q. What were these three men doing?

A. They were on lookout, two of them always on, one is a lookout, one has a station by the wheelman, and a third one performing various work and duties, deck duties about the deck.

Q. So that there were three men on watch?

A. Three men on watch.

Q. Regularly in each one of the watches?

A. Yes.

Q. Instead of two, as he claims?

A. Yes.

Q. One of these you state was a lookout?

A. Was a lookout.

Q. Now, Mr. McCrea, in his libel in paragraph 10th states that on arrival at London, because, as he says, of the failure to divide the able seamen and ordinary seamen in equal watches and the failure to divide the firemen, water tenders and oilers also in equal watches, he demanded his discharge from the vessel at the time of his arrival along with the payment of the wages then standing to his credit, and one month's additional pay. Having before you that statement which he sets forth in his libel, does that refresh your recollection about the time of his making his demand when the crew was getting their allowances which were due them on arrival in London?

A. I distinctly remember that he made no demands other than for his full pay, and quoted the names, that is, the [fol. 64] titles of the law that I have mentioned; and it was necessary for me after I got through advancing the money to go up and look up that law, look up those titles before I realized why he demanded that money.

Q. Did he say anything or make any demand for employment on board some other vessel?

A. He made no other demands through me other than that I should pay him the money he had earned up to that period.

Q. Mr. McCrea, in his libel in paragraph 13th, states that it was dangerous to operate the "American Shipper" as she was being operated in the matter of the arrangement of the watches as claimed by him, because it left the vessel without proper lookout and without adequate force to manage and maneuver the vessel, and that the vessel was therefore unseaworthy by reason of the failure to provide proper watches. What have you to say with respect to that allegation?

A. I say he is wrong.

Q. What do you mean when you say "wrong," wrong about what?

A. As to what constitutes the watches on board the ship, as he alleges we did not carry proper watches; we did; we had proper lookouts at all times, lookouts such as called for by law. We had men on the bridge there who were perfectly able and capable of performing their duties as required and maneuvering the ship at all hours of the day and night, and there was no danger, not a source of danger to navigation, and the ship was thoroughly seaworthy in every way and respect.

[fol. 65] Q. Did you in addition to those who were on the regular watches during the day time from 8 to 12 and 12 to 4 have any other than the three whom you have described as being on watch on duty in deck work?

A. Yes, sir.

Q. Will you tell us about them?

A. There was a carpenter; there was a boatswain; a seaman about decks there as a deck watchman, and performing his eight hours out of the twenty-four. There was a man performing various duties, including those of yeoman, during the time that he was performing his eight hours out of twenty-four; there was a man who had charge of the storerooms, keeping the various watches supplied with what materials they might need from the ship's stores and performing eight hours out of twenty-four.

Q. What can you say, Captain Cumings, in reference to this statement that six of the ten able seamen were placed on day work from eight to five the day after leaving port and continued as such until the arrival in London; were

these men he refers to those which you have just mentioned, or part of them?

A. He might have been mistaken, having seen men around deck. I don't know where he gets information from. I don't know what he is thinking of. We have men there. There are three men on a watch. There are three men on a watch, day time as well as night time. We also have other men. There is a boatswain, a carpenter, and as I have stated, three other seamen employed at different times about the decks.

[fol. 66] Q. These other seamen supplemented the watches which were going on at the time?

A. Yes, sir.

Q. And what were their general duties; were the general duties of these other men that of doing such work as is incidental to the navigation of the ship?

A. Incidental to the navigation of the ship, and to the cleanliness of the ship; necessary work in preparing to have the ship ready for entering a foreign port.

Q. Was this a passenger ship?

A. It was a passenger ship, yes.

Q. Did you have any complaint from any members of the crew in reference to the matter of the watches?

A. None at all.

Q. Did you have any complaints from any of the passengers with reference to the safety of the ship?

A. Never.

Q. I suppose, Captain, that you do not know of your own knowledge anything about what occurred between Mr. McCrea and the officials of the American Consulate at the times he was there?

A. No, because I was not present.

Q. Anything you know is simply hearsay?

A. Hearsay.

Q. Which came from your discussion with Mr. Miller?

A. With Mr. Miller.

Q. And Mr. Pinkerton?

A. Mr. Miller and Mr. Pinkerton.

Q. When you were at the Consulate on Monday, and also when you were off the ship on the other days during the week, who was left in charge of the ship?

A. The chief officer.

[fol. 67] Q. What was his name?

A. Eric Nelson.

Q. Is Mr. Nelson connected with the Leviathan?

A. No, sir.

Q. What ship is he connected with?

A. At the present time he is chief officer of the President Roosevelt.

Q. Do you know whether Mr. Eric Nelson is now in port or not?

A. I believe he is.

Q. What position did you say he held and on what ship?

A. Chief officer of the President Roosevelt.

Mr. Cunningham: I think that is all.

Cross-examination.

By Mr. Scoble:

Q. Captain, prior to the sailing from New York was your vessel inspected by the Steamboat Inspection Office, or any other inspection?

A. What was that question?

Q. Prior to the sailing of the "American Shipper" from New York on this voyage, was the vessel inspected by the Steamboat Inspection Office?

A. Of course, it has to be. You cannot sail without that inspection.

Q. Was any certificate issued?

A. She had a certificate, yes.

Q. Does that certificate describe how many men should be carried in the crew and in what capacity?

A. It does, yes.

Q. And does it state how many men are carried?

A. How many men are carried?

Q. Yes.

A. Not how many men are carried, it does not. It states how many men should be carried.

[fol. 68] Q. Do you know where that certificate is at the present time?

A. There is a record of it in the United States Steamboat Inspection Service.

Q. Now, you have stated that you carried, I think you said, eleven men?

A. Eleven able seamen.

Q. And two ordinary seamen?

A. Ordinary seamen.

Q. Is it not a fact that one of the able-bodied seamen was used in clerical duties all the time?

A. Not all the time.

Q. But at the time he was doing his watches he was used in clerical duties?

A. He was sometimes used for clerical duties, and sometimes used for other duties about the ship. These duties that he performed were duties incidental to the navigation of the ship.

Q. You have referred to five men who did special duty. Were those five men included in the thirteen men of the ship as ordinary seamen?

A. What five men are you referring to?

Q. Carpenter and yeoman, and those five different ones you spoke of.

A. The carpenter and the boatswain were not.

Q. Were the other three?

A. The other three were, yes.

Q. Did the three men who stood on watches at all times include any officer?

A. No.

Q. Was there a notice posted in the sailors and/or firemen's messroom directing certain sailors to work on day duty?

A. None that I know of.

[fol. 69] Q. Did you sign any such notice?

A. No.

Q. Was the whole or any part of the crew during said voyage needed for the maneuvering of the vessel or performance of work necessary for the safety of the crew of the vessel, or for the safety of life aboard another vessel, or for life boat, fire or other drills?

A. I don't understand your question.

(Question repeated.)

The Witness: Were they needed? I don't understand your question.

Mr. Scoble: All I am asking is whether any emergency ever came up by which it became necessary to do that on that voyage.

The Witness: There was no emergency. We held our fire and boat drills as called for by law.

Q. Was the assignment of able-bodied seamen or ordinary seamen to the various watches or to day duty entered in the log?

A. Was the assignment entered in the log book?

Q. Yes.

A. Not that I know of.

Q. Isn't it customary to enter into the log the assignment of each man who is on certain watch?

A. No; you enter in the log book the names of the lookouts.

Q. Do you enter in the log book any names of any men who are assigned to day duty?

A. No. The names of men performing routine work are never entered. The lookouts are entered.

Q. Was there any entry made in the log in relation to the [fol. 70] assignment of the men?

A. Merely the names of the lookout entered at the time they performed duty as lookouts.

Q. Who has possession of the log of the ship at this time?

A. The United States Lines, Inc.

Q. While the men were on watch did not one of them at various times have to call the next watch, and also get coffee for the officer on watch?

A. He had to call the next watch, his relief, and the relief of the others that were on duty at that time, but he never had to wait on the officers as personal servants of any character.

Q. When the "American Shipper" arrived in England was a list of the crew filed with the American Consul?

A. Yes.

Q. Do you know where that list is now; do they send it over here?

A. I could not tell you what their procedure is. I know that they call for a crew list there under Form 680, which we make out and they have filed, which we make out and deliver to them.

Q. Upon returning to New York, did you file a report of the McCrea case with any department or official here?

A. I made the usual log book entry in the Official Log Book, and reported down to the Customs House and to the United States Shipping Commissioner.

Q. Does that report contain the names of the crew?

A. Merely incidental to the McCrea case. It contains nothing else; no other reference.

Mr. Scoble: I think that is all.

[fol. 71] Redirect examination.

By Mr. Cunningham:

Q. Captain, will you for the purpose of the record describe the duties of the three men whom you have stated were always on watch during the regular watches?

A. One man is assigned to a lookout and is kept as far forward on board ship where he can see all around as it is possible to keep a man with safety, with relation to the safety of the man himself, another man is assigned to duty as a wheelsman, and on this ship his duties consist merely of watching the performance of the automatic helm which is used for steering on this ship to see that it is working properly at all times.

Q. Give the location on the ship?

A. This man, this wheelsman is at all times at his position; it is the same as a helmsman on a ship, this ship being equipped with a Gyro-Pilot.

Q. Whereabouts is the wheel?

A. On the bridge.

Q. Now, the third man?

A. A third man has general duties about the ship but always within call of the bridge. He is used as a relief lookout when necessary, as a relief helmsman, when necessary, or employed carrying messages from the bridge to the engine room or to the various parts of the ship as may be necessary in the performance of the safe navigation of the ship.

Q. And in general charge of all these men is an officer, is there not?

A. Yes, sir; a licensed officer.

[fol. 72] Q. Where is he stationed?

A. On the bridge.

Mr. Cunningham: That is all.

Examination concluded.

Respondent's Exhibit D—Deposition of Paul C. Nielsen

In United States District Court

[Title omitted]

Deposition of Paul C. Nielsen, a witness on behalf of the respondent, United States of America, taken, by consent,

at the office of the United States Shipping Board, 45 Broadway, New York City, on November 2, 1931, at 11 A. M., before Irvin Taber, Notary Public.

Appearances:

George Z. Medalie, Esq., United States Attorney, for the Respondent. Frederick H. Cunningham, Esq., of Counsel.

John M. Scoble, Esq., Proctor for Libellant.

[fol. 73] It is stipulated that the testimony may be taken by a stenographer and transcribed, signing, sealing, certification and filing being hereby waived; all objections, except as to form, to be reserved for the trial, and stenographer's fees to be taxable as costs.

Paul C. Nielsen, a witness on behalf of respondent, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Cunningham:

Q. Mr. Nielsen, please give your full name and address.

A. Paul C. Nielsen; permanent address, I have none; you can address me just to the office or to the ship—S. S. "American Shipper," Pier 4, Hoboken.

Q. Are you connected at the present time with the Steamship "American Shipper?"

A. Yes, sir.

Q. Did the "American Shipper" arrive in port on Saturday, the 31st of October?

A. October; yes, sir.

Q. When does it sail?

A. Eleven o'clock, Wednesday, November 4.

Q. That is, next Wednesday?

A. Yes, sir.

Q. In what department have you spent your time?

A. The engine department.

Q. What license do you hold?

A. Chief engineer, any gross tonnage.

Q. How long have you been going to sea?

A. Fourteen years.

Q. Were you connected with the Steamship "American Shipper" during the year 1928?

A. Yes, sir.

[fol. 74] Q. In what capacity?

A. First assistant engineer.

Q. Had you been connected with that ship prior to 1928?

A. Yes, sir.

Q. For how long?

A. From October, about the 20th, 1925.

Q. So you have been connected with the "American Shipper" continuously up to the present time since some time in 1925?

A. Yes, sir.

Q. What position did you hold in February, 1928?

A. February, 1928—first assistant engineer.

Q. And is that the position you hold at the present time?

A. No; chief engineer at the present time.

Q. Who was the chief engineer of the "American Shipper" in February, 1928?

A. W. O. Swatridge.

Q. Is Mr. Swatridge alive now?

A. No, sir; he died last March.

Q. And you succeeded him as chief engineer of the ship?

A. Yes, sir.

Q. Now, do you remember a voyage which began on or about February 15, 1928, sailing from New York, in which the libellant, Livingston H. McCrea, was one of the members of the crew connected with the engine department of the "American Shipper"?

A. Yes, sir.

Q. Did McCrea ever sail with you before that time?

A. No, sir.

Q. Has he ever sailed with you since that time?

A. No, sir.

[fol. 75] Q. What job did Mr. McCrea hold?

A. Fireman.

Q. What do you say as to his capacity and ability in the job which he had?

A. Satisfactory to me.

Q. He did whatever work he was called upon to do in a satisfactory manner?

A. Yes, sir.

Q. Did he complete the voyage or did he leave the ship when it arrived on the other side, at London?

Mr. Scoble: I object to the question as leading and calling for a conclusion.

Mr. Cunningham: Question withdrawn.

Q. Was McCrea with the ship when you returned to New York?

A. No, sir.

Q. Where did he leave the ship?

A. In London, England.

Q. Now, do you remember what the make-up or complement of the engine department was on this voyage?

A. The whole engine department entirely, or just the man——

Q. The question is do you remember?

A. Yes.

Q. How many engineers did you have?

A. Four.

Q. And they were what, respectively?

A. One chief, one first assistant engineer, one second, and one third assistant engineer.

Q. How many firemen did you have?

A. Six.

Q. How many motor tenders did you have?

A. Three.

[fol. 76] Q. How many oilers did you have?

A. Eight.

Q. Did you have a certificate of inspection on the ship?

A. Yes, sir.

Q. Do you know what the certificate of inspection called for as to the number of water tenders, firemen and oilers, respectively?

A. Yes, sir.

Q. What did it call for?

A. It called for three water tenders, six firemen, and three oilers.

Q. And you had, you say, three water tenders, six firemen and eight oilers?

A. Yes, sir.

Q. In other words, five oilers more than the number the certificate of inspection called for?

A. Yes, sir.

Q. Now, tell us how the water tenders were divided as to watches.

A. Well, they were divided into three watches, four hours on and eight off.

Q. And how were the water tenders divided, how many to each watch?

A. One to each watch.

Q. Now, how were the firemen divided as to these three watches?

A. Two firemen to each watch, equally divided into three watches.

Q. Now, how were the oilers divided as to these three watches?

A. One oiler on each watch in the main engine room, two oilers watch and watch with the refrigerating engineer.

Q. One on each watch?

A. One on each watch.

Q. With the refrigerating engineer?

A. Yes, in the refrigerating plant. Then, the other three [fol. 77] performed various duties in the engine room from 8 A. M. to 5 P. M., with one hour for lunch.

Q. Now, let us get this clear, Mr. Nielsen. Do I understand that these eight oilers were assigned to duty in this way: One oiler each on the eight to twelve watch, one on the twelve to four watch, and one on the four to eight watch?

A. Yes, sir.

Q. Then two of the remaining oilers were assigned to refrigerating duty?

A. Yes, sir.

Q. And there was, was there, a refrigerating engineer?

A. Yes, sir.

Q. And do I understand that the refrigerating engineer stood one watch?

A. Yes, sir.

Q. And the other two oilers stood the other two watches, respectively?

A. Yes, sir.

Q. So that there were three watches for the refrigerating engineer work?

A. Yes, sir.

Q. Then there were three other oilers left over?

A. Yes, sir.

Q. And those three oilers, as I understand it, were assigned to day work, standing on duty from 8 in the morning until 5 in the afternoon, with time off, of course, for lunch?

A. Yes, sir.

Q. And after that time those three oilers were off duty until the next morning?

A. Yes, sir.

Q. And what did those three men who did the day duty work at during the day?

A. Well, various performances in the engine room, repairs, cleaning, and what may occur, every-day performances in the engine room.

[fol. 78] Q. In other words, they were assigned to various duties which were necessary in the engine room in the operation of the engine in driving the ship?

A. Yes, sir.

Q. How many different departments are there generally to the running of a ship?

A. Well, three.

Q. What are the three main departments?

A. Deck department, steward department, and engine department.

Q. Do the men who are signed on for those respective departments devote themselves entirely to the work of those departments?

A. Yes, sir.

Q. Under certain conditions, as in emergencies, everybody can be called on to help; is that not so?

A. Yes, in emergency cases, yes.

Q. And that is a sea custom, is it not?

A. Yes; it is.

Q. Now, in addition to that, is there in the articles of the men when they sign on anything about their helping, particularly with reference to the mails?

A. Yes; there is a clause in the articles that the crew must assist in unloading mail and baggage.

Q. But outside of those two the work of the men is confined to the particular department in which they sign on?

A. Yes, sir.

Q. Now, those assigned to the deck department have to do generally with what kind of work?

A. Well, overhauling or cleaning, and so forth, the entire running of the deck department.

Q. The work, for example, of cleaning up the decks as it becomes necessary——

A. Yes.

[fol. 79] Q. —is for the deck department to take care of?

A. Yes.

Q. And the deck department, as I understand it, is composed of able seamen and ordinary seamen?

A. Able seamen, ordinary seamen, and boatswains.

Q. And over them are officers, the captain, the first, second and third mates; is that not so?

A. That's right.

Q. Now, do you assign, in connection with your duties, any of the engine room force to do work on the decks?

A. No; with the exception——

Q. State just what you have in mind.

A. Well, if it is a thing caused by my department or the engine department, I should say, why, I have done so.

Q. Now, in the course of the work of the engine department do you sometimes have an accumulation of waste, oil or refuse?

A. Yes.

Q. And what is done with that?

A. Taken up in a bucket on deck and thrown overboard.

Q. On the "American Shipper" was that the way which was provided to get rid of such refuse oil as accumulated from watch to watch?

A. Yes, sir.

Q. And at the end of a watch was this refuse oil disposed of in that way by that particular watch?

A. Yes, sir.

Q. Now, what occasionally happens, if anything, in dumping that refuse oil overboard?

A. Well, it occasionally happens that they go and dump it to the windward side, which they should not do.

[fol. 80] Q. And what happens when they do that?

A. It would blow back on the ship at times and spatter over the paint work, and so forth.

Q. In other words, oil dumped to windward is blown back on the deck and other parts of the structure at that level?

A. Yes.

Q. Does anybody else dump the oil except those of the engine force?

A. No, sir.

Q. So that when that thing happens who is to blame for the condition which results from its blowing back on deck?

A. Well, it would be the firemen.

Q. That is, whoever from the engine crew has done it?

A. Yes.

Q. And is that dumping done by the firemen or by the water tenders, or by the oilers?

A. By the firemen.

Q. By the firemen Now, when that occurs, Mr. Nielsen, what do you do with respect to cleaning up the muss?

A. Well, I have told them I would make them clean up if they made any muss that is unnecessary. I make the man off duty clean it up.

Q. The man off duty clean it up?

A. Yes.

Q. Under those conditions do you, as one of the engineers in charge, direct members of the engine crew to do that work, which takes them on deck?

A. Yes.

Q. Is there any other time when any of the engine force is called upon to do work which ordinarily would be the clean-up work of the able seamen or ordinary seamen?

A. No, sir.

[fol. 81] Q. Is the idea behind having the firemen clean up such a muss one in the nature of disciplinary action?

Mr. Scoble: I object to that as calling for a conclusion and leading.

Mr. Cunningham: You may answer it.

(Question read by the reporter.)

A. Yes, sir.

Q. How long does it take usually to clean it up?

A. Oh, fifteen minutes—ten, fifteen minutes—or twenty minutes, at the most.

Q. Of course, it would vary with the amount of muss that had been made?

A. Yes; it would vary, say, fifteen to twenty minutes at the most.

Q. Now, what did you have charge of as first assistant?

A. Four to 8 watch.

Q. What watch was Mr. McCrea on, if you remember?

A. Eight to 12 watch.

Q. Who had charge of the 8 to 12 watch?

A. The third assistant engineer.

Q. Now, do you remember an occasion while on this voyage where it became necessary to call upon the firemen to clean up a muss such as described?

A. Yes, sir.

Q. Do you remember just what date it was?

A. No; not exactly what date. I remember it was on the east-bound voyage; I couldn't say the exact date.

Q. Well, do you remember whether it happened more than once?

A. No; only once.

Q. Well, Mr. McCrea, in his libel, says that on or about the 22d day of February, 1928, the firemen of the 8 to 12 [fol. 82] watch were ordered to wash rails, bulkheads and booms on the after well deck. Would you say that it was about that date that this happened?

A. About then, yes.

Q. The ship sailing somewhere around the 15th or 16th of February, 1928?

A. Well, that would be about right. I could not vouch for the exact date.

Q. But you do remember, then, that it happened only once?

A. Yes.

Q. And that you did direct some firemen to clean up such a muss?

A. Yes, sir.

Q. Now, was Mr. McCrea one of those who was directed to clean up that muss?

A. No, sir.

Q. Why not?

A. Because he was on duty in the fire room.

Q. He then was on the 8 to 12 watch?

A. Yes, sir.

Q. And was not one of those called to clean up this muss, because he was on duty?

A. Yes, sir; that's right.

Q. What is the custom when a thing like this happens, as to who shall be called on to clean up such a muss?

A. Well, the guilty person.

Q. Do you find out usually who the guilty person was?

A. No, sir.

Q. In other words, the man who has dumped this to windward does not admit it as a rule, does he?

A. No, sir.

Q. As a matter of fact, did you ever know one to admit it?

A. Not yet; no, sir.

Q. And your experience runs through how many years?

A. Fourteen years.

[fol. 83] Q. So that since that is the case, what do you, as the engineer in charge, do?

A. Take all the fireroom crew that is off duty and make them clean it up.

Q. And some of those have just come off their watch?

A. Yes, sir.

Q. And some of them had been on the previous watch?

A. Yes, sir.

Q. And those are the ones that you call upon to clean up such a muss?

A. Yes, sir.

Q. As for those that are on the watch which is then running, like the 8 to 12 watch, are they ever directed to leave the engine room and go up and assist in such cleaning operation?

A. No, sir.

Q. Why not?

A. We couldn't; they are on duty; they would be absent from duty in the fire room.

Q. And if they were ordered out of the fire room, why, what would be the condition below?

A. Well, you just merely would not have a full crew in attendance at your fires or various duties.

Q. And the operation of running the ship, as far as the engine department is concerned, would be interfered with?

A. Yes.

Q. And is it necessary to have a complete complement of men down in the engine room in order to tend to the various duties?

A. Well, yes.

Q. How many fires were there down in the engine room of the "American Shipper," if you remember?

A. Twenty-four.

Q. So that if the firemen had been called up on deck to clean up the muss there would have been some twenty-four [fol. 84] fires left unattended?

A. Well, there is a water tender, as well as two firemen, in the fire room.

Q. The water tender's business hasn't anything to do with tending to the fires, has it?

A. Well, no; not tending to the fires.

Q. But he is competent to do it?

A. He is more than competent; he is there to see that the other men do it.

Q. As a matter of fact, a water tender ranks over the firemen, does he not?

A. Yes.

Q. How do you learn about this condition on deck which requires the cleaning up as you have been describing?

A. How do I learn about it?

Q. Yes?

A. Well, I am notified by the chief officer.

Q. That is, the chief mate?

A. The chief mate, yes.

Q. And on this occasion did the information come to you in that way?

A. Yes, sir.

Q. At the present time does the "American Shipper" still carry eight oilers, five beyond the number which is required by the certificate of inspection, United States Certificate of Inspection?

A. Yes, sir.

Q. Did McCrea leave the ship when you arrived at London?

A. Yes, sir.

Q. Do you know anything about the circumstances surrounding his leaving the ship?

A. No, sir; I do not.

Q. Was somebody put in his place after he left the ship on the return voyage?

[fol. 85] A. I am not positive of that; I would not like to commit myself; I am not positive whether there was a man put in his place or not.

Q. Well, he was a fireman?

A. He was a fireman, yes.

Q. You are required to have at least six firemen, are you not?

A. Yes.

Q. But you just don't remember——

A. (Interposing.) I don't remember; it is long ago.

Q. The log books would show?

A. My own records would show.

Q. Would the engine room log show that?

A. The engine room time books or the ship's official log would show it.

Q. Do you know whether or not he was logged as a deserter on his failure to return to the ship?

A. I do not; no.

Q. Of your own knowledge you know nothing about that?

A. No.

Q. But you simply do know that he did not return to the ship?

A. Yes.

Q. Do you know whether or not when he left the ship he took his clothes and belongings with him?

A. No; I don't know.

Q. Mr. Nielsen, is this custom which you have described, of having the firemen clean up a muss like this, one which is generally followed on the ships?

Mr. Scoble: I object to that as calling for a conclusion and as leading.

A. Well, did you say ships or ship?

Q. Well, on ships generally?

A. Yes.

[fol. 86] Q. And is it still followed on the "American Shipper?"

A. Yes.

Mr. Cunningham: I think that is all.

Cross-examination.

By Mr. Scoble:

Q. Mr. Nielsen, you have testified in relation to a certificate of inspection issued by the Steamboat Inspection Service. Have you a copy of such certificate?

A. No, no; there is one on the ship, framed.

Q. Is a duplicate copy of that certificate kept in the department?

A. I couldn't say; but it must be in the Customs Office, but I am not sure.

Mr. Cunningham: That is, a duplicate copy is on file?

The Witness: As far as I know, when the inspection is made, which is annually, they take up the old certificate, and when the inspection is made they send over a new certificate, and the old one is taken up; what happens to it after that, I don't know; but no doubt it is on file.

Q. With what department?

A. With the United States Steamboat Inspection Service.

Q. At the time you ordered the firemen up to clean the

decks was any entry made as to what men were ordered up on that date?

A. No, sir.

(Deposition concluded. Signature waived.)

[fol. 87] RESPONDENT'S EXHIBIT "D"—DEPOSITION OF IAN S. MACHARDY

IN UNITED STATES DISTRICT COURT

[Title omitted]

Deposition of Ian S. MacHardy, a witness on behalf of the respondent, United States of America, taken, by consent, at the office of the United States Shipping Board, 45 Broadway, New York City, on November 19, 1931, at 4 P. M., before Irvin Taber, Notary Public.

Appearances:

George Z. Medalie, Esq., United States Attorney, for the Respondent, Frederick H. Cunningham, Esq., of Counsel.
John M. Scoble, Esq., Proctor for Libellant.

It is stipulated that the testimony may be taken by a stenographer and transcribed, signing, sealing, certification and filing being hereby waived; all objections, except as to form, to be reserved for the trial, and stenographer's fees to be taxable as costs.

[fol. 88] IAN S. MACHARDY, a witness called on behalf of Respondent, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Cunningham:

Q. Mr. MacHardy, are you at the present time connected with the Steamship "American Trader", which arrived in port yesterday, November 18, 1931?

A. Yes, sir.

Q. What is your job on that ship?

A. Third assistant engineer.

Q. How long have you followed the sea?

A. Well, for the last fifteen years.

Q. Have you spent all your time in the Engine Department?

A. All my time in the Engine Department.

Q. Were you before you joined the American Trader connected with the Steamship "American Shipper", No. 28?

A. Yes, sir.

Q. Did you make a voyage on the "American Shipper" in the capacity of oiler, sailing from New York February 15, 1928?

A. Yes, sir.

Q. Did the ship go to London and return?

A. London and return.

Q. Did you make the entire trip?

A. Yes, sir.

Q. Do you remember a member of the crew in the Engine Department by the name of Livingston H. McCrea?

A. Yes.

Q. What was his job?

A. Fireman.

[fol. 89] Q. Do you remember another fireman by the name of McGuire?

A. Yes, sir.

Q. Were those two men, McCrea and McGuire, both on the same watch?

A. Yes.

Q. What watch was that?

A. Eight to twelve watch.

Q. You say you have followed the sea for fifteen years, all of which time has been spent in the Engine Department?

A. All of which time has been spent in the Engine Department.

Q. Now, in the work of the Engine Department does it become necessary usually at the end of each watch to dump oil which has accumulated?

A. Yes. In the fire rooms the fireman at the end of his watch mops up the web racks, and, naturally, there is some dirty oil in the bottom of the bucket, and it is usual for each one to dump it. Naturally, they take the easiest way and dump it over the side if nobody is looking.

Q. Then, it is an incident of the work in the engine room to dump waste oil at the close of perhaps every watch?

Mr. Scobel: I object to that as calling for a conclusion and as leading.

A. Yes; it is the custom at the end of the watch for each one to take up the mess of oil that they have made and to dump it overboard.

Q. Now, do the firemen do this work?

A. The fireman cleans the fire room and the oiler cleans the engine room.

Q. And who is it that dumps this waste oil?

A. Well, that is done by the fireman, because there is no oil in the engine room to dump.

[fol. 90] Q. And if they dump it on the aft end of the vessel it usually goes clear of the vessel?

A. Oh, naturally it goes clear.

Q. But if they dump it to windward what happens?

A. Well, it flows back on the ship and spatters beams and hand rails.

Q. Now, when this happens who cleans up the muss?

A. Well, if possible you try and find out who made the mess; but that is usually a very hard job.

Q. Why?

A. Well, it is carelessness, in the first place, and they just figure that nobody seen them and they get away with it.

Q. That is, the fireman who does it against orders—that is, who dumps the oil to windward—does not own up to it when asked by the assistant engineer; is that the idea?

A. No; I have never known them to do it. It is pretty natural at that.

Q. Now, as a result of that who are ordered to clean up that muss?

A. Well, when they can't get anybody to admit that they did it they usually go on the forecastle and take everybody and send them out to clean the mess.

Q. In other words, it is a sort of disciplinary measure to stop their being careless in dumping the oil?

Mr. Scoble: Objected to as leading.

A. Yes.

Q. Now, when a muss of this sort occurs in this way and the order is given to the firemen who are in the forecastle

to clean up the muss does that order include the men who [fol. 91] are on watch during that particular watch, or are the men who are at work down in the engine room on watch left there?

Mr. Scoble: I object to that as leading.

A. It has never been to my knowledge known to take men off watch to clean the mess; it is left to those who are actually off watch.

Q. What watch were you on?

A. I was on the eight to twelve watch.

Q. I think you have already testified that McCrea, the libellant herein, and a fellow named McGuire were the two firemen who were on that same watch?

A. Yes.

Q. Now, on that voyage do you remember any case when it became necessary to clean up such an oily muss caused by dumping oil?

A. I remember an occasion when there was oil spilled and a mess made, and I remember the first engineer trying to find out who had made the mess, and he could not.

Q. Was the first engineer the one who was in charge of the watch which is ahead of yours?

A. Yes; four to eight watch.

Q. And do you know whether he directed the firemen to clean this muss up?

A. On his watch I don't know, any of his orders on his watch.

Q. Well, was the muss cleaned up while you were on watch?

A. I did not actually witness the muss being cleaned up, but I know that it was cleaned up in the evening some time.

Q. That is, during the time that you were on watch?

A. Yes.

[fol. 92] Q. And during that time that you were on watch when this condition was reported were either McCrea or McGuire or you ordered to go up there and clean up?

A. I was not ordered up there to clean up, and to my knowledge I never heard the engineer order McCrea or McGuire up to clean up.

Q. Who else besides you and these two firemen comprised the watch, the eight to twelve watch?

A. The third assistant engineer and the water tender.

Q. So that on that watch down in the engine room there was the third assistant engineer, two firemen, one water tender and one oiler?

A. One oiler—right.

Q. And was that the regular make-up of the watches?

A. Yes; that is the standing watch; all watches.

Q. How many firemen did you carry on that voyage?

A. Six firemen.

Q. And how many water tenders?

A. Three water tenders.

Q. And how many oilers altogether?

A. Well, if I have to include——

Q. Include them all.

A. —refrigerating oilers, there is six oilers and two refrigerating oilers—eight oilers.

Q. Making eight in all?

A. Yes.

Q. And were two of those oilers assigned to the refrigerating work?

A. Oh, yes; they were on watch.

Q. So it left two on watch on the refrigerating work, [fol. 93] one oiler on each one of the regular watches?

A. Yes.

Q. And what became of the other three oilers?

A. They are at work all the time.

Q. From what to what?

A. Eight in the morning until five at night, with one hour for dinner, twelve to one.

Q. And the other men are stationed on regular watches of four hours on and eight hours off?

A. Four on and eight off.

Q. Did you at any time on this voyage ever see McCrea washing up the paint work or the beams or the rails of the after well deck?

A. At no time. I never seen McCrea participating in anything like that.

Q. Now, Mr. MacHardy, in the libel or complaint which Mr. McCrea has filed he makes this statement—he says:

"That on or about the 22nd day of February, 1928, during said voyage, all of the firemen on the 8 A. M. to 12 noon watch were ordered and compelled by the respondent, through the master or other superior officers of the said

vessel, "American Shipper," to go on deck to wash rails, bulkheads and beams on the after well deck, said firemen being necessarily absent from the fire room and their duties as firemen for a long period of time; that during the said period of time the duty of attending to twenty-four fires, as well as properly attending to water in the boilers, was left to one water tender."

[fol. 94] Now, do you remember any such condition as that occurring on the voyage while you were connected with the ship?

A. No. To my knowledge and from my own observation I never seen that; at no time did I see the fire room empty of firemen or clear of firemen.

Q. Now, what did your work as oiler call upon you to do?

A. My work as oiler called upon me to lubricate the different pumps in the engine room and to pump the bilges, which means that towards the end of the voyage I have to go in the fire room and open up the valves to pump the various bilges.

Q. So that your work as oiler would call you back and forth from the fire room to the engine room, and from the engine room to the fire room?

A. Yes.

Mr. Cunningham: I guess that is all.

Cross-examination.

By Mr. Scoble:

Q. Mr. MacHardy, how many voyages have you made since February, 1928?

A. I have been consistently employed ever since that date. I have been in the employ of the American Merchant line right up to the present. I served on the "American Shipper" until last year, and I served on the "American Banker" until last February, and I have served on the "American Trader" from April until the present date.

Q. How long does it take to go from New York to London?

A. New York to London, on an average, is ten days.

Q. How long does it take to make a round trip?

[fol. 95] A. A round trip—do you mean actual sailing time, or the period from signing on to signing off?

Q. Signing on to signing off.

A. Signing on to signing off is an average of twenty-eight days.

Q. How many trips do you make a year?

A. Well, I would have to look that up.

Q. Well, approximately.

A. Right offhand I should say nine—eight or nine trips.

Q. When did you first talk to anybody about this case?

A. The first I knew of this case was a man coming on board and asking if I saw McCrea—I could not say the date—I think it was—it was a short while after this occurrence happened—I could not say the date offhand, and I could not mention the month either, but as I remember it, it was shortly after that had happened.

Q. Where was that—in New York?

A. In New York. It was—I don't know—somebody—an investigator come aboard and asked if I saw McCrea, the oiler, and I was asked to make a statement then.

Q. At that time how many trips had you made subsequent to the time McCrea was on the ship?

A. How many trips on the "American Shipper"?

Q. Yes.

Mr. Cunningham: No; subsequent.

Q. Subsequent to the time that McCrea was on the ship.

A. Well, I would have to think, whether that was my first or second trip; I could not say offhand whether that was [fol. 96] my first trip or not; I would have to look up my record for that, which I could do; I have got every voyage since that date, since my first date; I could soon find out.

Q. Is there anything that impressed this trip on which McCrea was on your mind?

A. What do you mean—did McCrea impress himself on me?

Q. For any reason or anything that McCrea happened to do on the watch on that particular trip, did that make any impression on you?

A. No; I cannot say as there was anything noticeable to my knowledge. In fact, I think I would pass the man by; that is how much I knew him. Only the first few months you remember a man, but after a few years you forget faces.

By Mr. Cunningham:

Q. What is your present address?
A. 3820 Waldo avenue, near 238th street, Bronx.

Mr. Cunningham: That is all.
Mr. Scoble: That is all.

(Deposition concluded. Signature waived.)

[fol. 97] RESPONDENT'S EXHIBIT E—DEPOSITION OF LOWELL C. PINKERTON

IN UNITED STATES DISTRICT COURT

[Title omitted]

Direct Interrogatories Asked of and Answered by Lowell C. Pinkerton of London, England, a Witness on Behalf of Respondent, Pursuant to a Commission Issued in the United States District Court, Southern District of New York

1. Q. What is your full name?
A. Lowell Call Pinkerton.
2. Q. What is your address?
A. St. John's Wood Court, London, N. W., England.
3. Q. Are you connected officially with the American Consular Service located at #18 Cavendish Square, London, England, at the present time?
A. I am.
4. Q. If so, in what capacity?
A. As American Consul.
[fol. 98] 5. Q. Did you hold such position on February 27, 1928?
A. I did.
6. Q. Please state in general your duties, and in particular in respect to American seamen?
A. On February 27, 1928, I was acting as Executive Officer of the American Consulate General in London and, under the direction of the Consul General, assisted the officer in charge of the Shipping Department in the conduct of the business of that Department.
7. Q. What is the authority of the American Consular Service of #18 Cavendish Square, London, England, in

respect to American seamen and the matter of their discharge either on their own or the Master's application?

A. When application is made to the American Consulate General either by Master or a seaman for the discharge of a seaman, the Consular Officer is required to consider the application and determine whether or not the seaman is entitled under any of the laws or general maritime practice to such discharge. The authority for the action is contained in the Statutes of the United States and in general Maritime Law, as practised in the United States.

8. Q. In a case arising in the port of London, in which is situated a branch of the American Consular Service, has the Master of an American vessel the power to discharge a seamen without your approval i. e., the approval of the American Consul?

A. The Master has no such authority.

9. Q. What is the procedure in relation to discharging a seaman.

[fol. 99] A. The procedure in relation to discharge of a seaman varies dependant upon the reason for the discharge. The Statutes in some cases provide that a formal hearing shall be conducted to determine whether the claim is justified. However, usually the consular officer to whom application is made determines for himself whether such application may be approved.

10. Q. Must the discharge of a seaman be approved by you, i. e., by the American Consul?

A. The discharge of a seaman must be approved by a consular officer when the discharge is made abroad.

11. Q. Can the Master of a ship upon demand by a seaman to be paid off, on arrival at London, do so without referring the matter first to your office, i. e., the office of the American Consular Service?

A. No.

Q. (a) Why?

A. (a) Because a fine is provided if the Master fails to produce his crew upon the return to the United States but such penalty is not provided in case the Master can produce a list of those who have been discharged in a foreign country with the consent of a Consul or Vice-Consul there residing, certified under his hand and seal.

12. Q. Did Livingston H. McCrea, an American seaman of the crew of the Steamship "American Shipper," come to your office on February 27, 1928, and make a demand to

be paid off from said ship with wages in full, together with a month's extra wages and transportation back to the United States?

A. Yes.

[fol. 100] 13. Q. Did he see you personally on that day?

A. Yes.

14. Q. Were you acting in your official capacity?

A. Yes.

15. Q. On what did he base his demand?

A. As stated in his demand, he claimed discharge because certain men were assigned to duty in violation of Section 2 of the Seaman's Act of March 4, 1915, i. e., he claimed that certain men in the deck department were not assigned to watch.

16. Q. Please state in full detail what took place between you. (a) Did he see you first or some other attache of the Consulate, and if so, state who, if you know? (b) Please relate any conversation you had with McCrea, if any, in relation to his status in England, in the event of his failing to rejoin his ship before departure if the Consulate denied his application and claim.

A. (a) As I recall the interview, the man first saw Vice-Consul Miller and made his demand and Mr. Miller, believing the man not to be entitled to discharge and yet wishing further advice on the subject, spoke to me. (b) I then talked to McCrea and I believe that he was advised that he could not be discharged for any cause whatever in a British port without the consent of the British Immigration authorities. This consent would have to be obtained prior to discharge. I am not sure but I believe that he was also advised, in reply to a question from him, that if he failed to rejoin his ship, he would be subject to arrest and deportation by the British Immigration authorities as an [fol. 101] alien illegally in England.

17. Q. Did he present his demand orally or in writing?

A. He presented his demand first orally and then, at the suggestion of Vice-Consul Miller, in writing.

18. Q. If he presented his claim first, orally, did he thereafter file it at your request in written form under date of February 27, 1928?

A. He did.

19. Q. How many times did McCrea call at the Consulate's office and on what dates?

A. I only saw him the one time. He may have called prtviously or subsequently but I have no knowledge on that subject.

20. Q. What time was it when he called on February 27, 1928?

A. I do not remember.

21. Q. Was there a hearing? If so, at what hour?

A. There was no formal hearing.

22. Q. If not, what course or routine was followed?

A. Vice-Consul Miller and I discussed the application with McCrea orally and at that time consulted the Statutes and Regulation on the subject.

23. Q. Was McCrea alone at the time he came to the Consulate?

A. So far as I know, yes.

24. Q. Who was present, including representatives of the Consulate?

A. Vice Consul Miller, L. M. Hames, Clerk in the Consulate General, H. Garnham, Clerk in the Consulate General, and myself.

25. Q. Was a decision made at once on his claim, i. e., on the same day? If not, state when and whether orally or [fol. 102] in writing and if in writing how it was addressed?

A. A decision was made at once on his claim and he was advised orally. When he requested a statement in writing as to the decision, he was advised to make his request in writing and his letter would be answered. He made such request on February 29th, and a reply was sent to him on March 1st, addressed: "Mr. L. H. McCrea, Fireman, S. S. 'American Shipper,' Surrey Docks, London."

26. Q. Was Captain Cumings present at any time when McCrea was at your office?

A. I did not see Captain Cumings at any time while I was talking to McCrea.

27. Q. Did you or the American Consulate thereafter under date of February 29, 1928, receive a letter from McCrea submitting his claim again, but as a written one?

A. Yes.

28. Q. Was McCrea ordered by you to return to his ship?

A. According to my recollection, McCrea was advised that he could not be discharged, but I do not recall having ordered him to return to his ship. Mr. Miller may have given him such instructions.

29. Q. Did McCrea write you direct on February 29, 1928?

A. McCrea's letter of February 29, 1928, was addressed as follows: "Mr. Pinkerton, American Vice-Councillor, Cavendish Sq., London, England."

Q. (a) If you have answered the Twenty-Ninth Interrogatory in the affirmative, will you please attach a certified copy thereof to these answers, marking it Exhibit "B"?

[fol. 103] A. (a) Document produced by Witness, identified by him, and a certified copy thereof, marked Exhibit "B," signed by Witness and Commissioner is attached to the Commission.

30. Q. Did you see the written claim of February 27, 1928, referred to as Exhibit "A" at the time you talked with McCrea, if you, in reply to #16 (b) have answered that you did have a talk with him?

A. Yes.

Q. (a) Did McCrea write you direct under date of February 29, 1928? If so, please attach a certified copy of his letter to these answers as Exhibit "B."

A. (a) He did. See answer to interrogatory No. Twenty-nine (a).

31. Q. Did you personally answer it in writing passing on and deciding McCrea's claim or was the decision at the direction of the Consul General?

A. I did not personally reply to the letter but I saw the reply before it was forwarded. All correspondence is "at the direction of the Consul General."

32. Q. Did the decision therein reject or approve his claim?

A. The letter rejected his claim.

33. Q. Is it customary in cases of dispute bewteen a master and a seaman to hold formal hearings thereon?

A. In the case of certain disputes the Statutes and Consular Regulations provide for a formal hearing but no such provision is made in the Statute with regard to the violation of Section 2 of the Act of March 4, 1915.

[fol. 104] 34. Q. Was such a hearing demanded?

A. Not in my presence.

35. Q. Did McCrea visit the Consulate offices again after February 27, 1928? If so, when?

A. I only saw him on the one occasion. He may have visited the office again without my having seen him.

36. Q. What is the status of a seaman who leaves his ship without permission of the master or the American Consul? And allows it to sail without him?

A. A seaman who without cause leaves his ship without permission of the Master, or without having been formally discharged before an American consular officer and allows the ship to sail without him is either a straggler or a deserter, dependent on the circumstances under which he leaves the ship and whether he intends to return thereto.

37. Q. If the facts disclose that McCrea, having been notified of the sailing of his ship, and having had his claim rejected by the American Consul, wilfully failed and refused to rejoin his ship, was his status that of "deserter"?

A. Under the Consular Regulations if a seaman wilfully leaves his ship without cause and with intent not again to return thereto, he is regarded as a deserter.

38. Q. Assuming the facts as set forth in the Thirty-Seventh Interrogatory, state whether under such conditions McCrea was proper subject of arrest pending deportation, pursuant to the English Immigration Law as it existed on March 2, 1928?

A. Yes.

[fol. 105] 39. Q. Was Captain Cumings, Master of the Steamship "American Shipper," at the Consulate offices on February 27, 1928, either before or after McCrea was there?

A. I did not see him.

40. Q. Was Captain Cumings there subsequently between February 27, 1928, and March 2, 1928, the date his vessel sailed?

A. I did not see him.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Cross-Interrogatories Asked of and Answered by Lowell C. Pinkerton of London, England, a Witness on Behalf of the Respondent, Pursuant to a Commission Issued in the United States District Court, Southern District of New York

1. Q. If you have answered the 12th interrogatory herein in the affirmative, please state whether at the time of said

[fol. 106] demand you had read and were familiar with Section II of the Act of March 4th, 1915, chapter 153 of the Laws of the United States, being 38 Stat. 1164, relating to requirements as to watches, duties of seamen, right to discharge; and other matters.

A. I was familiar with it and also read it again in McCrea's presence.

2. Q. If you have answered the 12th Interrogatory in the affirmative, please state whether at the time of said demand you had read and were familiar with the decision of the Supreme Court of the United States, in the case of O'Hara and Tjerland vs. Luckenbach Steamship Company, 269 U. S. 364.

A. I have not read the decision but it may have been incorporatel in the Consular Regulations which are issued by the Department of State for the guidance of consular officers in their duties toward seamen.

3. Q. If you have answered the 12th Interrogatory in the affirmative, please state whether at the time of said demand you had read and were familiar with Section 4583 of the Revised Statutes of the United States.

A. Yes.

4. Q. If you have answered the 12th Interrogatory in the affirmative, state fully all conversation between yourself and Livingston H. McCrea, on the 27th day of February, 1928, or any subsequent date, respecting the law governing his said demand.

A. All that I recall with regard to the interview is contained in the answer to the sixteenth direct interrogatory.

[fol. 107] 5. Q. Did you discuss at the time or times mentioned in the last previous Cross Interrogatory, with said McCrea, the applicability to his said demand of the decision of the Supreme Court of the United States in O'Hara and Tjerland vs. Luckenbach Steamship Company, 269 U. S. 364.

A. So far as I recall it, it was not mentioned.

6. Q. Was it your opinion and conclusion that the decision of the Court in O'Hara and Tjerland vs. Luckenbach Steamship, did not apply to the case presented by the demand of said Livingston H. McCrea, for the reason that said Livingston H. McCrea was a fireman, while in the O'Hara case mentioned the demand was made by a seaman on the ground that the seamen were not properly divided into watches.

A. As stated in reply to the previous Cross Interrogatory, I do not recall that the Supreme Court decision was mentioned. However, McCrea stated to Mr. Miller and Mr. Miller informed me that McCrea himself was affected in no way by the action of the Master in the distribution of his crew, that he himself was assigned to watches, and it was thought that he, therefore, had no right to complain or demand discharge under the Statute mentioned since it did not affect him or his work in any way.

7. Q. State fully all that you said to the said Livingston H. McCrea, if anything, respecting the applicability of the decision of the Court in the said O'Hara Case, to the said demand made by the said Livingston H. McCrea.

[fol. 108] A. As stated before, I do not recall that the Court decision was mentioned in my presence.

8. Q. If you have testified to previous interrogatories, direct or cross, that the said Livingston H. McCrea made demand to be paid off from said Steamship "American Shipper," his wages in full, together with a month's extra wages and transportation back to the United States, state fully whether you ever communicated in writing with said Livingston H. McCrea in response to such demand.

A. I did.

9. Q. If you have answered the last preceding cross interrogatory in the affirmative, then attach such communication, or a true copy thereof, to your deposition herein, and mark the same "Libellant's Exhibit I."

A. Communication produced by Witness, identified by him, and certified copy thereof, marked "Libellant Exhibit I," signed by witness and Commissioner, is attached to the Commission.

10. Q. If you have testified in response to previous interrogatories, direct or cross, that the said Livingston H. McCrea made demand to be paid off from said steamship "American Shipper" with his wages in full, together with a month's extra wages in full, together with transportation back to the United States, state whether or not you or any other person connected with the American Consular Service, examined or caused to be examined, the log of the Steamship "American Shipper," for the voyage referred to in said demand, from the 15th day of February to the [fol. 109] 27th day of February, 1928, or any subsequent date, in relation to said demand.

A. I did not examine the log nor did anyone else at my direction examine the log. Whether or not the log was actually examined I cannot say.

11. Q. Was the said log of the Steamship "American Shipper" from the 5th day of February, 1928, to the 27th day of February, 1928, or any subsequent date, exhibited to you or to your knowledge to Daniel Miller, or any other person connected with the American Consular Office?

A. It was not exhibited to me nor, to my knowledge was it exhibited to anyone else in the office.

12. Q. If you have answered cross interrogatories ten or eleven in the affirmative, state whether or not you have made any copy of said log or memoranda as to its contents.

A. My reply was in the negative.

13. Q. If you have answered the last preceding cross interrogatory in the affirmative, then attach said copy of said log or any memoranda you made in relation thereto, or a true copy thereof, to your deposition herein and mark the same "Libellant's Exhibit II."

A. My reply was in the negative.

14. Q. If you have answered Cross Interrogatory ten or eleven in the negative, state whether or not you called for or requested that the log of the Steamship "American Shipper," from the 15th day of February to the 27th of February or any later date exhibited to you or any other official in the United States Consular Office.

A. I do not know.

[fol. 110] 15. Q. Have you received any letter or written communication from any attorney or representative of the United States, or Edgar Wandless, counsel and proctor for respondent, or representative of his or other person, respecting your testimony herein, or any answer which you might give to any question herein propounded to you?

A. No.

16. Q. Have you received any oral communication from anyone respecting your testimony herein, or your answers to any question which might be propounded to you herein?

A. No.

17. Q. If you have answered the 15th Cross Interrogatory in the affirmative, then attach to your deposition herein such writing, or a true copy thereof, and mark the same "Libellant's Exhibit III."

A. My reply was in the negative.

18. Q. If you have answered the 16th Cross Interrogatory in the affirmative then state the names of any and all persons from whom such oral communication or communications have been received by you, and the substance thereof.

A. My reply was in the negative.

[fol. 111] RESPONDENT'S EXHIBIT "E"—DEPOSITION OF DANIEL MILLER

IN UNITED STATES DISTRICT COURT

[Title omitted]

Direct Interrogatories Asked of and Answered by Daniel Miller, of London, England, a Witness on Behalf of Respondent, Pursuant to a Commission Issued in the United States District Court, Southern District of New York

1. Q. What is your full name?

A. Daniel Miller.

2. Q. What is your address?

A. 25 Coniger Road, Parson's Green, London England.

3. Q. Are you connected officially with the American Consular Service located at #18 Cavendish Square, London, England, at the present time?

A. Yes.

4. Q. If so, in what capacity?

A. American Vice Consul.

5. Q. Did you hold such position on February 27, 1928?

A. Yes.

[fol. 112] 6. Q. If in reply to Interrogatory #3, you have replied in the affirmative, please state in general your duties in respect to American seamen.

A. Duties in respect to American seamen are as set forth in the Consular Regulations, and Instructions from the Department of State.

7. Q. What is your authority under the United States Statutes governing the discharge of seamen?

Mr. Scoble: I would like to object to the seventh interrogatory in the deposition of Daniel Miller.

The Court: What is that?

Mr. Scoble: "Q. What is your authority under the United States governing the discharge of seamen?" I object to that as immaterial and calling for a conclusion, in that the statutes themselves are the best evidence.

The Court: Objection sustained.

8. Q. In a case arising in the Port of London, in which is situated a branch of the American Consular Service, has the Master of an American vessel the power to discharge a seaman without your approval, i. e., the approval of the American Consul?

A. No.

9. Q. What is the procedure in relation to discharging a seaman?

A. When application for discharge has been made, the procedure followed depends on the circumstances. In some cases, formal hearings are provided under the Statutes. In mose cases, the consular officer can decide whether or [fol. 113] not the application should be approved.

10. Q. Must the discharge of a seaman be approved by you, i e., by the American Consul?

A. Yes.

11. Q. Can the Master of a ship upon demand by a seaman to be paid off, on arrival at London do so without referring the matter first to your office, i. e., the office of the American Consular Service? (a) Why?

A. A Master cannot lawfully discharge a seaman in a foreign port without the intervention of the consular officer. Section 4576 of the Revised Statutes, as amended by Section 3 of the Act of March 3, 1897, provides as follows:

Navigation Laws of the United States, 1927, under Part V., Merchant Seamen, on page 46:

Failure to Produce Crew

The Master of every vessel bound on a foreign voyage or engaged in the whale fishery shall exhibit the certified copy of the list of the crew to the first boarding officer at the first port in the United States at which he shall arrive on his return, and also produce the persons named therein to the boarding officer, whose duty it shall be to examine the men with such list and to report the same to the collector; and it shall be the duty of the collector at the port of arrival,

where the same is different from the port from which the vessel originally sailed, to transmit a copy of the list so [fol. 114] reported to him to the collector of the port from which such vessel originally sailed. For each failure to produce any person on the certified copy of the list of the crew the master and owner shall be severally liable to a penalty of four hundred dollars, to be sued for, prosecuted, and disposed of in such manner as penalties and forfeitures which may be incurred for offenses against the laws relating to the collection of duties; but such penalties shall not be incurred on account of the master not producing to the first boarding officer any of the persons contained in the list who may have been discharged in a foreign country with the consent of the consul or vice consul there residing, certified in writing, under his hand and official seal, to be produced to the collector with the other persons composing the crew, nor on account of any such person dying or absconding or being forcibly impressed into other service of which satisfactory proof shall also be exhibited to the collector (R. S. 4576; Mar. 3, 1897, sec. 3.)

12. Q. Did Livingston H. McCrea, an American seaman of the crew of the Steamship "American Shipper" come to your office on February 27, 1928, and make a demand to be paid off from said ship with wages in full, together with a month's extra wages and transportation back to the United States?

A. Yes.

13. Q. Did he see you personally on that day?

A. Yes.

[fol. 115] 14. Q. Were you acting in your official capacity?

A. Yes.

15. Q. On what did he base his demand?

A. He alleged that certain men had been assigned to duty in violation of Section 2, of the Seamen's Act of March 4, 1915, and claimed discharge, wages in full, and also one month's extra wages and transportation back to the United States, under Section 4583 of the Revised Statutes, as amended by Section 18 of the Act of December 21, 1898.

16. Q. Please state in full detail what took place between you?

A. McCrea stated his claim. I said I did not think he was entitled to discharge but suggested he make a formal

claim in writing and that I would then obtain advice on the matter. This was done.

17. Q. Did he present his demand orally or in writing?

A. Orally first, and in writing afterwards.

18. Q. If he presented his claim first, orally, did he thereafter file it at your request in written form under date of February 27, 1928?

A. Yes.

19. Q. If you have answered the Eighteenth Interrogatory in the affirmative, will you please attach to the answers hereto, a certified copy of the same, marking it Exhibit "A"?

A. I attach a certified copy of McCrea's affidavit, dated February 27, 1928.

Document produced by Witness, identified by him, and a certified copy thereof, marked Exhibit "A", signed by [fol. 116] Witness and Commissioner is attached to the Commission.

20. Q. How many times did McCrea call at the Consulate's Office and on what dates?

A. Only once, on February 27, 1928.

21. Q. What time was it when he called on February 27, 1928?

A. About 10 a. m.

22. Q. Was there a hearing? If so, at what hour?

A. No.

23. Q. If not, what course or routine was followed?

A. McCrea's claim was discussed with him orally by Consul Pinkerton and myself.

24. Q. Was McCrea alone at the time he came to the Consulate?

A. Yes.

25. Q. Who was present, including representatives of the Consulate?

A. Consul Pinkerton, L. M. Hames and H. Garnham, clerks in the Consulate General and myself.

26. Q. Was a decision made at once on his claim, i. e., on the same day? If not, state when and whether orally or in writing and if in writing how it was addressed?

A. A decision was made on McCrea's claim orally at once, i. e., on February 27, 1928. This decision was subsequently given in writing under date of March 1, 1928,

and was addressed as follows: "Mr. L. H. McCrea, Fireman, s.s. 'American Shipper' Surrey Docks, London."

27. Q. Was Captain Cummings present at any time when McCrea was at your office?

A. No.

28. Q. Did you or the American Consulate thereafter under date of February 29, 1928, receive a letter from McCrea submitting his claim again, but as a written one?

A. Yes.

[fol. 117] 29. Q. If you have answered the Twenty-eighth Interrogatory in the affirmative, will you please attach a certified copy thereof to these answers, marking it Exhibit "B"?

A. Document produced by witness, identified by him, and a certified copy thereof, marked Exhibit "B", signed by Witness and Commissioner, is attached to the Commission.

30. Q. Did you personally answer it in writing passing on and deciding McCrea's claim or was the decision at the direction of the Consul General?

A. Yes, I personally drafted the letter dated March 1, 1928, passing on and deciding McCrea's claim. The letter was, however, discussed personally with Consul Pinkerton. Also since all action of this Consulate General is under the responsibility of the Consul General, the letter was at his direction, as is all official correspondence of the office.

31. Q. Did the decision therein reject or approve his claim?

A. The letter rejected the claim.

32. Q. If you answered the Thirtieth Interrogatory in the affirmative, state when you answered it and to what address you sent your answer, together with date.

A. I answered McCrea's letter, dated February 29, 1928, on March 1, 1928. The answer was sent to the following address: "Mr. L. H. McCrea, Fireman, s. s. 'American Shipper,' Surrey Docks, London." It was handed to Captain Cummings on March 2, 1928, when he came to the Consulate General to clear his ship, for delivery to McCrea. [fol. 118] It was not delivered, and was afterwards returned to the Consulate General.

33. Q. If you have answered the Thirtieth and Thirty-second Interrogatories in the affirmative, please attach a

certified copy of the letter answering it, to these answers marking it Exhibit "C".

A. Document produced by Witness, identified by him, and a certified copy thereof, marked Exhibit "C", signed by Witness and Commissioner, is attached to the commission.

34. Q. If you found that McCrea was not entitled to the discharge sought, state the reasons therefor.

A. At the time McCrea made his claim, on February 27, 1928, he was informed that he could not be discharged here without the permission of the British immigration authorities. He stated in response to an inquiry that he had not applied for such permission, and, in any case, the British immigration authorities would not have given him the permission without a guarantee from this Consulate General to maintain and repatriate him. Such guarantee could only have been furnished by the Consulate General in the event that it was found that McCrea was entitled to the discharge sought.

It was in fact found that McCrea was not entitled to the discharge sought. The reasons were as follows:

In the first place, McCrea was not himself either directly or adversely affected by the alleged violation of Section 2 of the Seamen's Act of March 4, 1915. He stated in response to an inquiry that he had no complaint to make in [fol. 119] regard to the work to which he had been assigned during the voyage, or to the treatment he had received. He further stated that he was making his claim as a matter of principle. I then suggested he wait until the vessel returned to New York and make his complaint to the United States Shipping Commissioner there, but he refused to consider this suggestion.

In the second place, the "American Shipper" was on the voyage in question carrying sixty-eight men, as against the fifty-eight men prescribed in the Register. It was, therefore assumed that the master, being thus able to dispose of the services of ten extra men, had for all practical purposes complied with the provisions of Section 2 of the Seamen's Act of March 4, 1915, and that the violation, if any, was purely technical, and should properly be left for consideration by the United States Shipping Commissioner at New York following the completion of the voyage.

In the third place, I did not consider that the alleged violation of Section 2 of the Seamen's Act of March 4, 1915, was of a nature sufficiently serious to justify the discharge of a member of the crew with arrears of wages, one month's extra wages, and transportation back to the United States. McCrea's discharge under these conditions would have automatically entitled all the other members of the crew to discharge under the same conditions, and might thus have resulted in delaying or preventing the vessel's sailing. It was not considered that the alleged violation at all war- [fol. 120] ranted running the risk of such possible delay or prevention of sailing.

As indicative of the degree of importance to be attached to the alleged violation, it was considered significant that at the time McCrea came to the Consulate General and made his claim, he was not accompanied by any other member of the crew, in particular by any member of the crew stated by him to have been assigned to duty contrary to the provisions of Section 2 of the Seamen's Act of March 4, 1915.

35. Q. Is it customary in cases of dispute between a Master and a seaman to hold formal hearings thereon?

A. No.

36. Q. Was such a hearing demanded?

A. No.

37. Q. Did McCrea visit the Consulate offices again after February 27, 1928? If so, when?

A. Not to my knowledge.

38. Q. What is the status of a seaman who leaves his ship without permission of the Master or the American Consul? And allows it to sail without him?

A. He may be either a straggler or a deserter, according to the circumstances.

39. Q. If the facts disclose that McCrea, having been notified of the sailing date of his ship, and having had his claim rejected by the American Consul, wilfully failed and refused to rejoin his ship, was his status that of "deserter"?

A. Yes.

40. Q. Assuming the facts as set forth in the Thirty-ninth Interrogatory, state whether under such conditions McCrea [fol. 121] was proper subject of arrest pending deportation, pursuant to the English Immigration Law as it existed on March 2, 1928?

A. Yes.

41. Q. Was Captain Cummings, Master of the Steamship "American Shipper," at the Consulate Offices on February 27, 1928, either before or after McCrea was there?

A. Yes; Captain Cummings was at the Consulate General and entered his vessel on February 27, 1928, about an hour before McCrea had left.

42. Q. Was Captain Cummings there subsequently between February 27, 1928, and March 2, 1928, the date his vessel sailed?

A. Yes; Captain Cummings was at the Consulate General on March 2, 1928, and cleared his vessel, which sailed on that date.

[fol. 122] In United States District Court

[Title omitted]

Cross Interrogatories Asked of and Answered by Daniel Miller of London, England, a Witness on Behalf of the Respondent, Pursuant to a Commission Issued in the United States District Court, Southern District of New York

1. Q. If in answer to the 12th interrogatory herein, you have stated that Livingston H. McCrea, an American seaman of the crew of the steamship "American Shipper," came to your office on or about February 27th, 1928, and made a demand to be paid off from said ship with wages in full, together with a month's extra wages and transportation back to the United States, or other demand, please state whether at that time you had read and were familiar with Section II of the Act of March 4th, 1915, chapter 153 [fol. 123] of the Laws of the United States, being 38 Stat. 1164, relating to requirements as to watches, duties of seamen, right to discharge, and other matters.

A. Yes.

2. Q. If in answer to the 12th Interrogatory you have stated that Livingston H. McCrea, an American seaman of the crew of the steamship "American Shipper," came to your office on or about the 27th day of February, 1928, and made a demand to be paid off from said ship with wages in full, together with a month's extra wages and transpor-

tation back to the United States, or other demand, had you at that time read and were you familiar with the decision of the Supreme Court of the United States, in the case of O'Hara and Tjerland vs. Luckenbach Steamship Company, 269 U. S. 364.

A. No.

3. Q. If in answer to the 12th Interrogatory you have stated that Livingston H. McCrea, an American seaman of the crew of the steamship "American Shipper," came to your office on or about the 27th day of February, 1928, and made a demand to be paid off from said ship with wages in full, together with a month's extra wages and transportation back to the United States, or other demand, had you at that time read and were you familiar with Sec. 4583 of the Revised Statutes of the United States?

A. Yes.

4. Q. If you have stated in answer to previous Interrogatories, direct or cross, that said Livingston H. McCrea on the 27th day of February, 1928, made demand to be paid [fol. 124] off from said steamship "American Shipper," then state fully all conversation between yourself and said Livingston H. McCrea on February 27th, 1928, or any subsequent date, respecting the law governing his said demand.

A. Certain parts of the conversation between McCrea and myself are stated in answer to other of these interrogatories, direct and cross. Further than this, my own share in the conversation was almost altogether concerned with two things. First, with trying to induce McCrea to complete the voyage in accordance with his agreement under the articles and to make his complaint to the United States Commissioner on arrival at New York. Second, when McCrea refused to complete the voyage, with maintaining the position that the alleged violation of Section 2 of the Seamen's Act of March 4, 1915, was not of a nature sufficiently serious to justify allowing his claim and thus setting a precedent which might result in paying off an entire ship's crew, with one month's extra wages and transportation back to the United States, and in tying-up a United States Shipping Board vessel.

5. Q. Did you discuss at the time or times mentioned in the last previous Cross Interrogatory, with said McCrea the applicability to his said demand of the decision of the

Supreme Court of the United States, in O'Hara Tjerland vs. Luckenbach Steamship Company, 269 U. S. 364?

A. No; McCrea mentioned in connection with his demand the decision of the Supreme Court of the United States [fol. 125] in the case of O'Hara and Tjerland vs. Luckenbach Steamship Company, but I did not discuss the applicability of the decision to his demand.

6. Q. Was it your opinion and conclusion that the decision of the Court in O'Hara and Tjerland vs. Luckenbach Steamship Company, did not apply to the case presented by the demand of said Livingston H. McCrea for the reason that said Livingston H. McCrea was a fireman, while in the O'Hara Case mentioned the demand was made by seamen, on the ground that the seamen were not properly divided into watches?

A. I did not form an opinion and reach a conclusion as to whether the decision of the Court in O'Hara and Tjerland vs. Luckenbach Steamship Company did or did not apply to the case presented by McCrea's demand.

7. Q. State fully all that you said to the said Livingston H. McCrea, if anything, respecting applicability of the decision of the Court in the said O'Hara case, to the said demand made by the said Livingston H. McCrea.

A. I told McCrea I was not particularly concerned with the decision of the Court in O'Hara and Tjerland vs. Luckenbach Steamship Company, since I was prepared to reject his claim on other grounds.

8. Q. If you have testified to previous interrogatories, direct or cross, that the said Livingston H. McCrea, made demand to be paid off from said Steamship "American Shipper," his wages in full, together with a month's extra wages and transportation back to the United States, state [fol. 126] fully whether you ever communicated in writing with said Livingston H. McCrea in response to such demand.

A. Yes: on March 1, 1928.

9. Q. If you have answered the last preceding Cross Interrogatory in the affirmative, then attach such communication, or a true copy thereof, to your deposition herein, and mark the same "Libellant's Exhibit I."

A. Document produced by Witness, identified by him, and a certified copy thereof, marked Libellant's Exhibit "I",

signed by Witness and Commissioner, is attached to the commission.

10. Q. Was any record in writing kept by you or by the American Consular Service, in London, England, of the demand if any, made by Livingston H. McCrea, American seaman, of the crew of the Steamship "American Shipper," made on or about the 27th day of February, 1928, to be paid off from said ship with wages in full, together with a month's extra wages and transportation back to the United States, or other demand, and the proceedings taken thereon?

A. Yes.

11. Q. If you have answered the last preceding Cross Interrogatory in the affirmative, then attach to your deposition herein a true copy of the record of said demand and proceedings thereon, and each and every part thereof, and mark the same "Libellant's Exhibit II."

A. Documents produced by Witness, identified by him, and certified copies thereof, marked Libellant's Exhibit "II", signed by Witness and Commissioner, are attached to the Commission.

[fol. 127] 12. Q. If you have answered the 10th Cross Interrogatory in the negative, then state whether it was customary in the office of the American Consular Service of London, England, on and prior to the 27th day of February, 1928, to make no written record of the demands, if any, made by American seamen, and the proceedings thereon, for discharge from their ships, with a month's extra wages and transportation back to the United States.

A. No answer.

13. Q. If in answer to preceding Interrogatories, direct and cross, you have assumed to state the procedure in relation to discharging a seaman, then state whether or not such procedure is prescribed by statute or written rules or regulations?

A. Yes; the procedure in relation to discharging a seaman is prescribed by statute and/or written rules or regulations.

14. Q. If in answer to the last preceding Cross Interrogatory you have stated that the procedure in relation to discharging a seaman is governed, by statute and/or written rules and regulations, then attach to your deposition a copy of such written rules or regulations, and refer spe-

cifically to the statutory provision which you rely on as governing such procedure, and mark whatever is so attached "Libellant's Exhibit III."

A. I am unable to refer specifically to the statutory provision relied on as governing the procedure in relation to discharging a seaman. It is also impracticable to attach to this deposition a copy of the written rules and regula-
[fol. 128] tions. These are contained in the Department of Commerce publication entitled Navigation Laws of the United States and in the Consular Regulations, to which reference is made and of which copies are doubtless available.

15. Q. If you have answered the 10th Direct Interrogatory in the affirmative, then attach any rule or regulation, and refer specifically to any provision of the Statute, upon which you relied in making such answer and mark the matter attached "Libellant's Exhibit IV."

A. Certified copy of extract produced marked Libellant's Exhibit "IV", signed by Witness and Commissioner, and attached to the Commission.

16. Q. If you have answered the 40th Direct Interrogatory in the affirmative, then attach to your deposition a copy of the English Immigration Law, or other law, or the part thereof relied on by you in making such answer, and mark the same "Libellant's Exhibit V".

A. Document produced by Witness identified by him, and a certified copy thereof, marked Libellant's Exhibit "V", signed by Witness and Commissioner, is attached to the commission.

17. Q. Have you received any letter or written communication from any attorney or representative of the United States, or Edgar G. Wandless, counsel and proctor for respondent, or representative of his or other person, respecting your testimony herein, or any answer which you might give to any question herein propounded to you?

A. No. I have, however, seen the letter, dated Sep-
[fol. 129] tember 27, 1928, addressed to the Consul General, signed "Edgar G. Wandless."

18. Q. Have you received any oral communication from anyone respecting your testimony herein, or your answers to any question which might be propounded to you herein?

A. No.

19. Q. If you have answered the 17th Cross Interrogatory in the affirmative, then attach to your deposition herein such writing, or a true copy thereof, and mark the same "Libellant's Exhibit VI."

A. No answer.

20. Q. If you have answered the 18th Cross Interrogatory in the affirmative then state the names of any and all persons from whom such oral communication or communications have been received by you, and the substance thereof.

A. No answer.

LIBELLANT'S EXHIBIT I

The following men in the Engine Department of the s.s. "American Shipper" were assigned to day work when the vessel departed from New York, at 4 P. M. February 16th:

Oilers:

Carl Koski and one other man (name not known).

On deck the following sailors were assigned to day work:

A.B.'s:

Churchill, Wilmer, Conlon, Avery, Shaffer and Leslie.

[fol. 130] I claim these men were assigned to duty in violation of Section 2 of the Seamen's Act of March 4, 1915, and therefore I am entitled to my wages in full. I am also claiming in accordance with Section 4583 of the United States Revised Statutes one month's extra wages and transportation back to the States.

(Signed) Livingston H. McCrea, U. S. Dist. Court, S. D. of N. Y.

London, Feb. 27, 1928.

Witness: H. Garnhan.
Witness: L. M. Hames.

Lib. Ex. I.
May 6, 1932.
A 99-118.

RESPONDENT'S EXHIBIT A

McCrea, Livingston H., Fireman #44. For being absent from ship and duty without proper permission on Feb. 28th, and tho aboard ship from 3:20 PM Feb. 29th to 9:00 AM. March 1st, 1928 he failed to turn to on those day-. Failed to join ship at time of sailing from London and therefore declared a Deserter March 1st having last been seen aboard ship at 9:00 AM March 1st, 1928. Total lost time three (3) days. Logged and fined (six) days pay. $13.00.

(Signed) Schuyler F. Cummings, Master. (Signed) W. Swartridge, Ch. Engineer.

RESPONDENT'S EXHIBIT B
Certificate of Inspection

Form 841

FILE No. V 37399

[Rev 24.]

THIS CERTIFICATE EXPIRES February 26th , 1928.

Secretary's permit to use petroleum as fuel on file in the office of Local Inspectors at Philadelphia, Pa, dated Sep. 20, 1920.

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
STEAMBOAT INSPECTION SERVICE

CERTIFICATE OF INSPECTION
FOR STEAM OR MOTOR VESSEL

State of New York
District of New York

Ocean Passenger *Vessel* AMERICAN SHIPPER

APPLICATION in writing having been made to the undersigned, *Inspectors for this District*, to inspect the above-named vessel propelled by steam, of New York, in the State of New York whereof U.S.Shipping Board owner, and Schuyler F.Cummings is Master, said inspectors, having completed the inspection of the vessel on the 26th day of February, 192 7, DO CERTIFY that the said vessel was built at Hog Island in the State of Pennsylvania, in the year 1 921; rebuilt in the year 1 -; that the Hull is constructed of steel; and, as shown by official records, is of 7430 gross tons; that the said vessel has 26- Staterooms and 74 - Berths, and is allowed to carry 74 passengers, viz: 74 First cabin, - Second cabin, and - Deck or Steerage Passengers.

Included in the entire crew hereinafter specified and designated there must be 8 certificated lifeboat men.

When engaged in a run of less than 400 miles from the Port of departure to the Port of final destination, 2 Mates are required.

Conditions to be observed in connection with the stability test of this vessel are of record in the office of Local Inspectors at New York.

also is required to carry a full complement of licensed officers and crew, consisting of 1 Master, - Master and Pilot, - Pilot 1 Chief Mate, 1 Second Mate, 1 Third Mate, - Inland Mate, - Chief Mate and Pilot - Second Mate and Pilot, - Third Mate and Pilot, - Inland Mate and Pilot, - 3 Quartermasters, 6 Able Seamen, 2 Seamen, - Apprentices, - Deck Hand, 1 Chief Engineer, 1 First Assistant Engineer 1 Second Assistant Engineer, 1 Third Assistant Engineer, - Junior Engineer, 3 Water Tenders, 3 Oilers, 6 Firemen, - Coal Passer, - Wiper, 2 Watchmen, and also 34 persons when needed in Steward's and other departments not connected with the navigation of the vessel; that the said vessel is provided with 1 turbine Condensing Engine of - - inches diameter of cylinder and --- feet stroke of piston, and 6 Boilers, 14'7-3/8" in length and drum 42 inches in diameter, made of lawful steel, in the year 1 920, rebuilt in the year 1 - The said vessel is permitted to navigate, for one year, the waters of the

-----O C E A N S-----

between , and touching at intermediate ports, a distance of about miles and return.

WE FURTHER CERTIFY that the said vessel at the date hereof is, in all things, in conformity with the laws governing the Steamboat Inspection Service and the Rules and Regulations of the Board of Supervising Inspectors.

THE FOLLOWING PARTICULARS OF INSPECTION ARE ENUMERATED, NAMELY:

Anchors, No. 5 Cables, No. 2	Life buoys 8 Life luminous	MAIN BOILERS.	DONKEY BOILERS.
Has signal lights yes	Has line-carrying projectile, and means of propelling them Lyle Guns	Boiler plate: Thickness of .6"	No.
Metal lifeboats ..... No. 3	Fire extinguishers ..... No. 22	Tensile strength of 55000 lbs	Diameter of
Motor lifeboats ..... No. 1	Portable hand fire pumps ..... No. -	Record in local inspectors' office at Philadelphia, Pa	Thickness of plate
Working boat ..... No. -	Double-acting hand fire pumps ..... No. 2	Boiler shell drilled -- Thickness of plate [illegible] inch.	Tensile strength of plate
[illegible] ..... No. -		Longitudinal seams Double [illegible]	Record in local inspectors' office at

owner , and Pennsylvania R.R.Cummings is Master, said inspectors, having completed the inspection of the vessel on the 26th day of February , 192 7, DO CERTIFY that the said vessel was built at Reg Island in the State of Pennsylvania , in the year 1 921 ; rebuilt in the year 1 - ; that the Hull is constructed of steel ; and, as shown by official records, is of 7430 gross tons; that the said vessel has 26- Staterooms and 74 - Berths, and is allowed to carry 74 passengers, viz: 74 First cabin, - Second cabin, and - Deck or Steerage Passengers.

Included in the entire crew hereinafter specified and designated there must be 8 certificated lifeboat men.

When engaged in a run of less than 400 miles from the Port of departure to the Port of final destination, 2 Mates are required.

Conditions to be observed in connection with the stability test of this vessel are of record in the office of Local Inspectors at New York.

also is required to carry a full complement of licensed officers and crew, consisting of 1 Master, - Master and Pilot, - Pilot 1 Chief Mate , 1 Second Mate , 1 Third Mate , - Inland Mate , - Chief Mate and Pilot - Second Mate and Pilot , - Third Mate and Pilot , - Inland Mate and Pilot , - 3 Quartermasters , 6 Able Seamen, 2 Seamen, - Apprentices, - Deck Hand , 1 Chief Engineer, 1 First Assistant Engineer 1 Second Assistant Engineer , 1 Third Assistant Engineer , - Junior Engineer , 3 Water Tenders 3 Oilers , 6 Firemen, - Coal Passer , - Wiper , 2 Watchmen, and also 34 persons when needed in Steward's and other departments not connected with the navigation of the vessel; that the said vessel is provided with 1 turbine Condensing Engine of - - inches diameter of cylinder and --- feet stroke of piston, and 6 Boilers, 14'7-3/8" in length and drum 42 inches in diameter, made of lawful steel , in the year 1 920 , rebuilt in the year 1 - The said vessel is permitted to navigate, for one year, the waters of the

-----O C E A N S-----

between , and touching at intermediate ports, a distance of about miles and return.

We further certify that the said vessel at the date hereof is, in all things, in conformity with the laws governing the Steamboat Inspection Service and the Rules and Regulations of the Board of Supervising Inspectors.

THE FOLLOWING PARTICULARS OF INSPECTION ARE ENUMERATED, NAMELY:

Anchors, No. 5 Cables, No. 2 Has signal lights yes Metal lifeboats ..... No. 3 Motor lifeboats ..... No. 1 Working boat ..... No. - Collapsible lifeboats ..... No. - Every lifeboat has equipment in accordance with the rules yes Life rafts ..... No. - Life preservers for adults ..... No. 141 Life preservers for children ..... No. 15	Ancillary lifesaving appliances, No. and kind 19 Fire buoys 5 life luminous Has line-carrying projectile, and means of propelling same Lyle Guns Fire extinguishers ..... No. 22 Portable hand fire pumps ..... No. - Double-acting hand fire pumps ..... No. 2 Fire hose, total length of 900 feet. Fire buckets ..... No. 25 Water barrels ..... No. - Water tanks, No. - Aggr. No. 8 Date when shell was last drawn Sept.1926	MAIN BOILERS. Boiler plate: Thickness of .5" Tensile strength of 55000 lbs Record in local inspectors' office at Philadelphia, Pa Boiler shell drilled -- .1 Thickness of plate, lowest --- inch. Longitudinal seams DBSdouble riveted. Holes drilled Maximum steam pressure allowed 200 lbs. Hydrostatic pressure applied 300 lbs. Main steam pipe, thickness of .505 inch. Feed pumps for boilers ..... No. 4 Steam fire pumps, double-acting, No. 2	DONKEY BOILERS. No. ----- Diameter of Thickness of plate Tensile strength of plate Record in local inspectors' office at Maximum steam pressure allowed to donkey boiler, pounds. Hydrostatic pressure applied to donkey boiler, pounds.

State of New York
City & County of New York } ss:

G.T.Charlton, Inspector of Hulls.
J.T.Crone, Inspector of Boilers.

Subscribed and Sworn (Sworn or affirmed) to before me this 28th day of February, 192 7, by G.T.Charlton Inspector of Hulls, and by J.T.Crone, Inspector of Boilers.

E.H.Avery
Notary Public N.Y.Co

Office of U. S. Local Inspectors,
District of (Port) New York,N.Y., February 28, 1927.

We hereby certify that the above certificate is a true copy of the original issued by this office to the vessel named herein.

G.T.Charlton, Inspector of Hulls. J.T.Crone, Inspector of Boilers.

On vessels of over 25 gross tons, the original certificate must be framed under glass and posted in a conspicuous place in the vessel where it will be most likely to be observed by passengers and others. On vessels of not over 25 gross tons, the original certificate must be kept on board to be shown on demand. (*Section 4423, Revised Statutes.*)

Steam pleasure yachts are forbidden to carry merchandise or passengers for pay, unless upon change of character by the Inspectors of the Steamboat Inspection Service.

11—4186

[fol. 132] RESPONDENT'S EXHIBIT "A"—ATTACHED TO DEPOSITION OF DANIEL MILLER

Libellant's Exhibit "II"—Attached to Deposition of Daniel Miller

The following men in the Engine Department of the s.s. "American Shipper" were assigned to day work when the vessel departed from New York, at 4 P. M. February 16th:

Oilers:

Carl Koski and one other man (name not known).

On deck the following sailors were assigned to day work:

A. B.'s:

Churchill, Willmer, Conlon, Avery, Shaffer and Leslie.

I claim these men were assigned to duty in violation of Section 2 of the Seamen's Act of March 4, 1915, and therefore I am entitled to my wages in full. I am also claiming in accordance with Section 4583 of the United States Revised Statutes one month's extra wages and transportation back to the States.

(Signed) Livingston H. McCrea.

London, February 27, 1928.
D. M.

Witness: (Signed) H. Garnham.
Witness: (Signed) L. M. Hames.

(Documentary Stamp.)

[fol. 133] RESPONDENT'S EXHIBIT "B"—ATTACHED TO DEPOSITION OF LOWELL C. PINKERTON

Respondent's Exhibit "B"—Attached to Deposition of Daniel Miller

Libellant's Exhibit "II"—Attached to Deposition of Daniel Miller

(Copy)

Feb. 29th, 1928,
London, England.

Mr. Pinkerton Am. Vice Councillor, Cavendish Sq., London, England.

DEAR SIR: As per your request of Monday, Feb. 27th, 1928, I am hereby submitting in writing a statement in regards violation of Sec. 2 of the Seamen's act as violated aboard "S. S. Am. Shipper" in Command of Capt. Cummings.

I requested my wages in full on the above date stating verbally & in writing the names of seamen who violated the law also time and place.

I also requested a month's extra wages & transportation back to the states as provided for under the United States revised statu-es #4583.

All of which was refused me by you.

I beg to remain yours resp.

(Signed) L. H. McCrea Fireman "S.S. Am. Shipper," Surrey Docks, London, England.

(Documentary Stamp.)

[fol. 134] RESPONDENT'S EXHIBIT C—ATTACHED TO DEPOSITION OF DANIEL MILLER

Libellant's Exhibit "I"—Attached to Deposition of Danial Miller

Libellant's Exhibit "I"—Attached to Deposition of Lowell C. Pinkerton

London, England,
March 1, 1928.

886 DM:FR.

Mr. L. H. McCrea, Fireman, "s. s. American Shipper," Surrey Docks, London.

SIR: I am directed by the Consul-General to reply to your letter of February 29, 1928, in which you say you are submitting in writing a statement in regard to an alleged violation of Section 2 of the Seamen's Act on board the "s. s. American Shipper," which arrived here February 26, 1928, from New York, and in which you claim a month's extra pay and transportation back to the United States on account of the alleged violation.

As your letter gives no details in regard to the alleged violation, and is not accompanied by any statement in writing, it is presumed you also refer to the signed statement executed by you in this Consulate-General on February 27, 1928, to the effect that various oilers and able seamen were assigned to day work during the voyage just completed by the "American Shipper" from New York to London; that such assignment was in violation of Section 2 of the Seamen's Act of March 4, 1915; and that you are therefore [fol. 135] entitled to your wages in full, and also claim one month's extra wages and transportation back to the United States (under Revised Statutes' 4583, December 21, 1898, section 18).

From your letter and your signed statement, it would appear that the specific violation which you have in mind consists in the fact that, according to the statement, two oilers and six able seamen were assigned to day work, whereas section 2 of the Act of March 4, 1915, provides

that "the sailors shall, while at sea, be divided into at least two, and the firemen, oilers and water tenders into at least three, watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and the management of the vessel."

As you were advised when you called personally at the Consulate-General, it is the opinion of this office that you are not entitled to discharge for the reason which you present and I have therefore declined to require the master of the "American Shipper" to pay you the arrears of wages, extra wages and transportation to the United States as claimed.

Very respectfully yours, Daniel Miller, American Vice-Consul.

(A true copy of the signed original—F. R.)

(Documentary Stamp.)

[fol. 136] Libellant's Exhibit "IV"—Attached to Deposition of Daniel Miller

(Copy)

Consular Regulations, Article XIII, Discharge of Seamen, Paragraph 205, which reads as follows:

Penalty for failure to return seamen.—The master of every vessel bound on a foreign voyage or engaged in the whale fishery is required by law to exhibit a certified copy of the crew list to the first boarding officer at the first port in the United States at which he shall arrive on his return and also to produce the persons named in the crew list. For each failure to produce any person on the certified copy of the crew list the master and the owner of the vessel are severally liable to a penalty of $400. But the penalty is not incurred for failure to produce any person named in the crew list who has been discharged in a foreign country with the consent of a consular officer, certified in writing under his hand and official seal to be produced to the collector with the other persons composing the crew list; nor on account of any such persons dying or absconding or being forcibly impressed into other service of which satisfactory proof shall then also be exhibited to the collector. A

master can not lawfully discharge a seaman in a foreign port without the intervention of the consular officer; and it is not material in such case that the discharge is made with the seaman's consent, or that he has misconducted himself, or is not a citizen of the United States.—R. S. 4576; Op. Att. Gen., 349; I Low, 107; Tawney's Dec., 24; 29 Stat. L., 688; E. O. Oct. 21, 1915; E. O. Sept. 5, 1922.

(Documentary Stamp.)

[fol. 137] LIBELLANT'S EXHIBIT "V"—ATTACHED TO DEPOSITION OF DANIEL MILLER

Home Office, 26 Sep., 1921.

DEAR SIR: I beg to enclose for your information a copy of the "Notice to Masters" which will be served on the Masters of all ships arriving at the principal British Ports from Foreign, or coastwise from foreign, on and after 1st October, 1921.

I also enclose copy of a letter addressed by the Immigration Officers at the principal ports to the foreign Consuls and Mercantile Marine Representatives in their district.

I beg to say that on and after that date all alien seamen (except any upon whom a notice of refusal of leave to land is served) will have permission to land temporarily during the stay of the ship in port, but this permission will not as heretofore be given in writing.

Permission to land for discharge will be given to an alien seaman by the stamp of the Immigration Officer on the passport or consular certificate with the words "for discharge" written inside or close against the stamp. An alien seaman who is found ashore after his ship has sailed will be liable to prosecution under the Aliens Order 1920 unless he has this stamp on his passport or consular certificate showing that he has had permission to land for discharge and leave the ship.

[fol. 138] In order to ensure the smooth working of the regulations, and to avoid contraventions of the Aliens Order, I trust that you will be good enough to cooperate with the Immigration Staff by refusing to sign off an alien whose papers do not bear the Immigration Officer's stamp

and the words "for discharge", and that you will request your consuls at other ports to follow the same course. Any alien seaman who presents himself for discharge without the Immigration Officer's stamp on his papers should be referred to the Immigration Officer in the port in order to obtain it.

W. Haldane Porter, H. M. Chief Inspector, Aliens Branch.

(Documentary Stamp.)

The Consul General for the United States of America. 8L.169.

Part of Aliens Order, 1920

Notice to Masters of All Vessels from Foreign Including Vessels Arriving Coastwise from Foreign

Passengers. The Master must report to the Immigration Officer (by telephone or otherwise) as soon as the ship ar- [fol. 139] rives, if he has any passengers on board—including British subjects, distressed British seamen, passage workers, and stowaways. The Immigration Officer will then visit the ship. Every passenger must produce his passport or other papers to the Immigration Officer before leaving the ship.

Crew Lists. The attached crew list must be filled in by the Master and be delivered to the nearest Immigration office as soon as possible after the arrival of the ship. The crew list should include all coloured seamen who do not hold either a British passport or an emergency certificate of British nationality or a Board of Trade R. S. 2 certificate describing him as a British subject.

Crews. Under the Aliens Order no alien member of a crew (including a passage worker) may land for discharge, or if discharged on board ship may land, without the permission of an Immigration Officer. To obtain this permission the Master must send the aliens who wish to be discharged, with a ship's officer, to the Immigration Office. Each alien must bring his passport and other papers with him. The Board of Trade and foreign Consuls will not pay off an alien until his passport has been endorsed by the Immigration Officer "for discharge".

Alien members of the crew who are not to be discharged at this port are hereby granted temporary shore leave dur-
[fol. 140] ing the ship's stay in port, but this permission shall not apply to any alien upon whom a refusal notice is served by the Immigration Officer. The Master must report immediately to the Immigration Officer the desertion of any alien member of his crew.

By Order of the Secretary of State for the Home Department. P. T. O.

DEAR SIR: I am directed to forward for your information a copy of the "Notice to Masters" which will be served on the Masters of all ships arriving from foreign, or coastwise from foreign, at this port on and after ——.

By H. M. Customs,
Boarding Officer.

I am to point out that on and after that date all alien seamen (except any upon whom a notice of refusal of leave to land is served) shall have permission to land temporarily during the stay of the ship in port, but this permission will not as heretofore be given in writing.

Permission to land for discharge will be given to an alien seaman by the stamp of the Immigration Officer on the passport or consul certificate with the words "for discharge" written inside or close against the stamp. An alien seaman who is found ashore after his ship has sailed will be liable to prosecution under the Aliens Order 1920 unless he has
[fol. 141] this stamp on his passport or consular certificate, showing that he has had permission to land for discharge and leave the ship.

In order to ensure the smooth working of this regulations and to avoid contraventions of the Aliens Order, I am directed to ask for your full cooperation with regard to the discharge of alien seamen at this port, and to express the hope that any alien seaman who comes before you for discharge without the Immigration Officer's stamp on his papers may be referred to this Office to obtain it.

Yours faithfully, —— ——.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A 99-118

LIVINGSTON H. MCCREA, Libellant,

vs.

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper," Her Engines, Tackle, Appar-tus, etc., Respondent

John M. Scoble, Esq., attorney for Libellant.

Honorable George Z. Medalie, United States Attorney, for Respondent, (Frederick H. Cunningham, Esq., of counsel).

OPINION

[fol. 142] July, 1932.

KNOX, D. J.:

This action is brought by a seaman to recover wages claimed to be due him upon his arrival in London, England, on February 26, 1928. Furthermore, he asks for one month's additional wages, together with the amount of expenses allegedly incurred by him in securing transportation back to the United States, and also two days pay for each day since the above mentioned date.

Libellant was duly hired on or about February 15, 1928, to serve as a fireman on the vessel "American Shipper" on a voyage from New York to London and return, at wages of sixty-five dollars per month. Upon the arrival of the ship in London, libellant demanded of the master his discharge from the vessel, the payment of the balance of wages standing to his credit, one month's additional pay, and that he be provided with adequate employment on board some other vessel back to New York, quoting the titles of Section 2 of the Seamen's Act, and Revised Statutes, 4583. Seamen's Act, Section 2, (38 Stat. 1164, 46 U. S. C. A., Section 673) provides in part:

"In all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays or sounds exclusively, the sailors shall,

while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which [fol. 143] shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel."

In the case of O'Hara vs. Luckenbach Steamship Company, 269 U. S. 364, the Supreme Court of the United States held that under this section all the sailors of a vessel coming within the terms of the statute, must be divided into watches as nearly equal to each other numerically as the whole number of sailors will permit, pointing out that the purpose of the enactment was to promote safety at sea rather than to regulate the working conditions of the men.

In the case at bar there was clearly a violation of the exact requirements of the statutes, as authoritatively interpreted by the Supreme Court. According to the testimony of the respondent's own witness, Captain Cumings, the thirteen seamen on the vessel were not as equally divided into watches as that number permitted. Instead, three seamen were placed on each of the three watches, and four men were used for day duty and were not on any watch. It further appears that three oilers were not placed on any watch, but were assigned to day duty. The firemen and water tenders, however, appear to have been equally divided into three watches.

Upon this state of facts, there is no doubt that libellant was

"entitled to discharge from such vessel and to receive the wages earned."

[fol. 144] O'Hara vs. Luckenbach Steamship Company, supra. The fact that the vessel carried more seamen than was required by its certificate of inspection did not relieve the ship from compliance with the requirements of the statute. The additional men should also have been divided into watches. Southern Steamship Company v. Hair, 24 Fed. (2d) 94.

The acts of respondent in violating Section 2 of the Seamen's Act gave libellant the right to demand his discharge and to receive the wages he had earned. O'Hara v. Luckenbach Steamship Company, supra; Southern Steamship Company v. Hair, supra.

It does not seem to me, however, that libellant is entitled to an extra month's wages, and the cost of his passage home by reason of the provisions of R. S. 4583, (46 U. S. C. A. 685). That section of the shipping law is as follows:

"Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due [fol. 145] at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he was originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman."

The applicability of the terms of the statute just quoted to Section 673, out of which libellant's cause of complaint arises, was a subject of consideration by the Acting Attorney General of the United States upon August 9, 1927. That official then advised the Secretary of Labor that the provisions of Section 685, (being Section 4583 of the Revised Statutes, as amended) relating to the payment of an extra month's wages to seamen discharged in a foreign country because "the voyage is continued contrary to agreement" are not to be applied to consuls in cases of complaint by seamen for violation of Section 2 of the Seamen's Act of March 4, 1915. 35 Opinions of Attorney General, 292. General Farnum, who thus ruled, said, inter alia:

"Finally, in drafting section 2 of the Seamen's Act of March 4, 1915, Congress specifically dealt with the consequences of the violation of the prohibited acts and provided that 'whenever the master of any vessel shall fail to comply with this section,' then, in that event, 'the seaman shall be entitled to discharge from such vessel *and to receive the* [fol. 146] *wages earned.*' If Congress had intended this to be only a measure of partial relief in case of such violation, and had contemplated that a seaman would be granted the additional relief provided in section 4583 of the Revised

Statutes as amended, it is difficult to understand why it was not so specifically provided. The fact that Congress omitted such a reference, and did clearly and expressly deal with the measure of relief to be accorded, clearly indicates that such relief was to be exclusive. • • •"

This view of the law is not binding on this Court but I conceive it to be correct, and shall adopt it as my own.

Finally, a determination must be made as to whether libellant, by virtue of Section 3 of the Seamen's Act, (46 U. S. C. A., section 596), is entitled to two days' pay for each and every day during which payment of his wages has been delayed. The requirement of the law is that wages to which a seaman on a vessel making foreign voyages is entitled, shall be paid

—"within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens."

If, in the absence of sufficient cause, such payment be not made, the master or owner of the vessel shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods allowed by the statute.

[fol. 147] In O'Hara v. Luckenbach Steamship Company, 16 Fed. (2d) 681, after stating that

"the phrase 'without sufficient cause' "

should be construed as equivalent to

"without reasonable cause"

the court held

"that the refusal to make payment (in the case before it) was based upon reasonable cause, and that it would be unjust to penalize the steamship company because it litigated the question."

It should be noted that the interpretation of Section 2 of the Seamen's Act was in doubt when the Luckenbach suit was brought. In Southern Pacific Company v. Hair, supra, however, libellant was allowed to recover double pay, because the section had then received a final interpretation. Judge Walker stated:

"In view of the decision in the case of O'Hara v. Luckenbach S. S. Co., supra, we do not think that the fact that appellant in good faith desired to get its above considered contention judicially passed on constituted sufficient cause for the failure to pay appellees their earned wages."

For the same reason, respondent here can not claim that the master's doubt as to the meaning of the statute constituted "sufficient cause" for his failure to pay libellant.

For other reasons, nevertheless, I believe libellant should not recover double pay for the entire period over which [fol. 148] he claims he is entitled to receive the same. As appears from the proof, McCrea made his demand while the master was advancing money to members of the crew who were about to take shore leave. At that time the master declined to comply with the requests and demands of McCrea, but he asked the libellant to meet him the next afternoon at the American Consulate.

No claim is made of any ill treatment either in respect of this request or upon account of events transpiring during the voyage over. On the morning following the request made of Captain Cumings, McCrea orally presented his demand at the American Consulate, but left the office without awaiting the captain's arrival. The next day he departed the ship without seeing the captain, although that officer testified to his presence on board each and every day the ship was in port. On the day succeeding libellant's abandonment of the vessel, his written complaint was received at the Consulate, as had been requested. A Vice-Consul thereupon wrote McCrea that he was not entitled to his discharge, addressing the letter to the ship—the only address of libellant of which the Vice-Consul had knowledge. Since McCrea had already left the vessel, he never received the letter.

These facts make is apparent that McCrea did not give the captain a reasonable time within which to consider his demand. The proof is productive of a strong inference [fol. 149] that McCrea was not really desirous of favorable action upon his request for a discharge, and the payment of his wages. He wished, on the other hand, to make out a case against the vessel and her owner. In this connection, observation may be made that, having regard for the responsibilities of a master as imposed by Section 4576 of the Revised Statutes, as well as by other provisions of

law, it would be harsh and unreasonable to require him to make instantaneous decision upon questions of law raised by a seaman under pain of subjecting his owner to onerous burdens, should it subsequently appear, as it does, that McCrea's demand for discharge should have been granted. No such requirement is imposed by the statute. As previously stated, Section 3 of the Shipping Act requires a master to pay every seaman his wages,

"within twenty-four hours after the cargo has been discharged, or *within four days* after the seaman has been discharged, whichever first happens."

In the case at bar, libellant has not shown when the cargo was discharged. Consequently, assuming that within the statute libellant may be deemed to have received his discharge on the day upon which he demanded it, the captain still had four days within which to make payment.

In the light of the Captain's request that McCrea meet him at the Consulate, and that the latter failed to do so, there, or at any other place, although the master was on board the ship every day the vessel lay at London, it is apparent that the captain was without opportunity to pay [fol. 150] McCrea throughout the period within which he was entitled to reach a final decision. It follows that the master's failure to make payment to libellant was not "without sufficient cause," and, in consequence, libellant is not entitled to recover double pay from February 26, 1928. He should, however, receive double pay for the number of days that have intervened since this suit was begun, and the date of decree to be made herein. The reason which justified the master in withholding libellant's pay in London had ceased when libellant returned to the United States and made formal demand for the money payable to him at the time of his protest to the captain of the vessel. The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from a "sufficient cause."

July 26th, 1932.

—— ——, U. S. D. J.

[fol. 151] IN UNITED STATES DISTRICT COURT

APPLICATION ON BEHALF OF RESPONDENT FOR REHEARING

WEC:MG.
#35544.

August 13, 1932.

Docket No. A 99-118

LIVINGSTON MCCREA

v.

UNITED STATES—S. S. "American Shipper"

Hon. John C. Knox, United States District Judge, Woolworth Building, New York City.

MY DEAR JUDGE KNOX: Since reading your Honor's opinion in the above entitled case, in which a decree has been presented awarding to the libellant penalties against the United States for withholding wages, under the provisions of 46 U. S. C. A. 696, my attention has been called to the decision of Judge Goddard in Corrigan v. United States, 298 Fed. 610, 613, in which it was squarely held that under the same statute penalties could not be imposed against the United States. The decision cites the Supreme Court case, to the same effect, of Missouri Pacific R. R. Co. and Director General v. Ault, 256 U. S. 554, 563.

I am unable to find any decisions to the contrary.

[fol. 152] It seems to me, therefore, that a motion for rehearing should be granted in this case. Unfortunately I had planned to leave on a vacation on the 17th, and I understand that Mr. Scoble, proctor for the libellant, is now away, and would suggest, if agreeable to your Honor, that the signing of any decree be deferred at this time so that a motion for reargument can be made at a later date convenient to the Court and counsel.

I am sending a copy of this letter to Mr. Scoble.

Respectfully, William E. Collins, Special Assistant to the United States Attorney.

CC to John M. Scoble, Esq., 55 Liberty Street, New York City.

WEC:MG.

[fol. 153] IN UNITED STATES DISTRICT COURT

A 99-118

LIVINGSTON H. MCCREA, Libellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper," Her Engines, Tackle, Apparatus, etc., Respondent

Present: Honorable John C. Knox, District Judge.

DECREE—Aug. 12, 1932

The above entitled cause having come on to be heard upon the pleadings, proceedings and proofs herein filed on behalf of the above parties; and having been argued by their respective advocates; and after due proceedings had; on motion of John M. Scoble, Esq., proctor for the libellant; and due deliberation having been had, it is hereby

Ordered, adjudged and decreed, as follows:

That the libellant, Livingston H. McCrea, recover of and [fol. 154] from the United States of America, respondent herein, the sum of $28.95, constituting the wages due the libellant at the time of the demand therefor, to wit, the 26th day of February, 1928; and that libellant recover in addition, two days pay for one, namely, at the rate of $4.33 per day or $130.00 per month, from the 11th day of July, 1928, the date of the commencement of this suit, to the 12th day of August, 1932, the date of the entry of this decree, to wit, the sum of $6,374.33, together with the sum of $42.50 libellant's costs as taxed, together with the further sum of $40.00 for loss of clothing and effects, amounting in all to the sum of $6,456.83, with interest thereon at 4% per annum until paid.

Jno. C. Knox, C. W., United States District Judge.

Filed August 15, 1932.

[fol. 155] In United States District Court, Southern District of New York

[Title omitted]

Decision Granting Rehearing

Memorandum

In view of the decision in Corrigan vs. United States, 298 Fed. 610, which has now been brought to my attention for the first time, I will grant a rehearing in the above entitled suit. Counsel for the parties may arrange a time for rehearing by communicating with my secretary.

August 30, 1932.

Jno. C. Knox, U. S. D. J.

[fol. 156] In United States District Court, Southern District of New York

A 99-118

Livingston H. McCrea, Libellant,

against

United States of America, as Owner of the Steamship "American Shipper," Respondent

John M. Scoble, Esq., Proctor for Libellant.

Hon. George Z. Medalie, United States Attorney (William E. Collins, Esq., Assistant United States Attorney), of counsel.

February, 1933.

Opinion

Knox, D. J.

Knox, D. J.:

By memorandum opinion, dated August 30, 1932, a reargument of this case was granted. (See also former opinion in this suit dated July 26, 1932.) The question now before the Court, and which was not raised upon the original argument, is whether libellant is entitled to recover double

wages under R. S. Sec. 4529, 46 U. S. C. A., Section 596, in a suit brought against the United States. Respondent objects to the imposition of this liability on the ground that, in the absence of consent which is said not to have been [fol. 157] given, it cannot be subjected to a charge which is, or is in the nature of a penalty.

Libellant contends that the statute does not impose a penalty, but merely provides for increased compensation to seamen in the event of an unjustifiable delay in the payment of their wages. In support of his position, libellant relies principally upon three cases decided by the Circuit Court of Appeals for the Ninth Circuit, viz: Vincent v. United States, 272 Fed. 889; Gerber v. Spencer, 278 Fed. 886 and Buckley v. Oceanic S. S. Co., 5 F. (2d) 545, and upon the case of Cox v. Lykes Brothers, 237 N. Y. 376, 1924 A. M. C. 656.

The decision in Vincent v. United States undoubtedly required the United States to pay double wages under R. S. Section 4529. However, the point here raised seems not to have been litigated. If it was, the opinion of the Court is silent upon the question. In fact, it is arguable that had the matter come up for discussion, the ruling might have gone against libellants. I say this for the reason that the Court regarded the obligation to pay double wages as the imposition of a penalty upon the respondent.

In Gerber v. Spencer, it was held that seamen's claims for double pay under R. S. 4529 were protected by a lien similar to that which will attach for ordinary wages. At page 889, the Court said,—

"The purpose of the statute—is to secure to the seaman [fol. 158] an amount as extra pay by way of compensation for delay. The extra pay is an incident to the claim of wages proper."

In Buckley v. Oceanic S. S. Co., it was held that a seaman's suit for double pay was a suit for wages, and not for a penalty. Therefore, it was governed by the two year statute of limitations under Section 339 of the California Code of Civil Procedure, rather than by United States Revised Statutes, Section 1047, which permits suits to recover a penalty, accruing under the laws of the United States, to be commenced within five years after such accrual.

In Cox v. Lykes, the New York Court of Appeals, per Cardozo, J., held that a State Court had jurisdiction to give judgment for double wages, because under R. S. 4529 they constituted wages and were not a penalty within the meaning of Section 256 of the Judicial Code (28 U. S. C. A., Sec. 371), which confers upon the Federal Courts exclusive jurisdiction

"Of all suits for penalties and forfeitures incurred under the laws of the United States."

As opposed to these cases, respondent places chief reliance upon the decision of the Supreme Court in the case of Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554. It was there held that the United States, which had taken possession and control of the railroad, was not liable for the payment of a penalty for non-payment of wages to rail- [fol. 159] road employees, imposed by a statute of the State of Arkansas. In that case, Section 10 of the Federal Control Act declared that the carriers

"shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law";

and Section 15 stated that the

"lawful police regulations of the several states"

should continue unimpaired. The Arkansas statute provided that if a railroad failed to pay an employee his full wages within seven days after his discharge

"then as a penalty for such non-payment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid."

With reference to the nature of this statute, the Supreme Court of Arkansas held that, technically, it was not a penalty, and had said in Leep v. Railway Company, 58 Ark. 407, 440, 441:

"It is allowed for a double purpose, as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages."

Despite this construction of the provisions of the statute, the Supreme Court held that, in fact, it imposed a penalty to which the government had not consented to submit. At page 564, Mr. Justice Brandeis said:

[fol. 160] "The purpose for which the Government permitted itself to be sued was compensation, not punishment * * * Wherever the law permitted compensatory damages they may be collected against the carrier while under federal control. * * * *But double damages, penalties, and forfeitures, which do not merely compensate but punish,* are not within the purview of the statute * * * the amount recovered in the present case over and above the wages due and unpaid with interest *is in the nature of punishment* * * * Whatever name be applied, the element of punishment clearly predominates and Congress has not given its consent that suits of this character be brought against the United States." (Italics mine.)

This decision, true enough, dealt with a State statute, while the cases which are cited by libellant had to do with the identical statute involved in the present suit. Nevertheless, I am inclined to believe that the decision in the Ault case is controlling here. As pointed out by Cardozo, J., in Cox v. Lykes Brothers, supra.

"the same provision may be penal as to the offender and remedial as to the sufferer * * * *The nature of the problem will determine* whether we are to take one viewpoint or the other." (Italics mine.)

In that case, "the problem" was whether the State Court has jurisdiction to give a judgment for double damages [fol. 161] against a private corporation. Since Congress had enacted that such damages

"shall be recoverable as wages"

the Court of Appeals of New York said that

"in determining the bounds of jurisdiction, it is not to be classified as a penalty."

Similarly, in Buckley v. Oceanic S. S. Co., supra, the question was with regard to which statute of limitations should apply. In Gerber v. Spencer, the problem was whether a

seaman's claim for double pay was protected by a lien. In each suit the focus of attention was upon the jurisdiction and procedure incident to the assertion of claims by seamen, as to whom the provisions of R. S. 4529 are, to some extent, undoubtedly compensatory. Where, however, the focus of attention has been upon the respondent rather than upon the person seeking recovering, the Supreme Court has indicated, that differing considerations may lend to a different result.

In Collie v. Ferguson, 281 U. S. 52, the Supreme Court held the double pay provision of R. S. Section 4529 to be inapplicable in a case where the delay in payment of wages was due to the insolvency of the owner of the vessel on which the seaman was employed. In referring to the language of the statute, the court said, at pages 55, 56:

"We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not *exclusively compensatory,* but designed to prevent by its *coercive effect,* arbi- [fol. 162] trary refusals to pay wages, and to induce prompt payment when payment is possible." (Italics mine.)

Earlier in the opinion, after citing with approval many of the cases upon which the present libellant relies, the court stated that

"the increased payment for waiting time is not denominated wages by the statute, and the direction that it shall be recovered as wages does not purport to affect the condition prerequisite to its accrual * * *"

Although, in that case, the point chiefly litigated was not the same as that now before this court, the opinion is important in that it recognizes the fact that double wages are treated "as wages" for some purposes does not mean that they shall always be so recognized.

In the present suit "the nature of the problem" is different from that before the court in the cases which libellant cites. Although for purposes of jurisdiction and procedure, a suit for double pay may be classified as one based upon a claim for compensation, it does not necessarily follow that the imposition of liability for double pay upon the Government is not truly to be regarded as being in

the nature of a penalty, or punishment. Cf. Collie v. Ferguson, supra.

In the Ault case, which was treated as a suit against the United States, the Supreme Court established a test for [fol. 163] determining whether a statute is penal as to the United States. Under that criterion, the provisions of R. S. Sec. 4529 with respect to double pay clearly appear to be penal. In the Ault case, the Arkansas statute provided for the continued payment of wages at the same rate from the time of discharge until the date when the wages were paid. In the suit at bar, the burden imposed is twice as heavy: the offending party must pay

"a sum equal to *two days' pay for each and every day* during which payment is delayed."

From the decision and reasoning of the Ault case, it would seem that this liability cannot be imposed upon the Government. See Corrigan v. United States, 298 F. 610.

The decision previously rendered is modified so as to eliminate libellant's recovery of two days' pay for each day since the date upon which he was entitled to his discharge.

February 10, 1933.

Jno. C. Knox, U. S. D. J.

[fol. 164] In United States District Court

A 99-118

Livingston H. McCrea, Libellant,

against

United States of America, as Owner of the Steamship "American Shipper," Her Engines, Tackle, Apparatus, etc., Respondent

Present: Honorable John C. Knox, District Judge.

Final Decree—March 8, 1933

The above entitled cause having come on to be heard upon the pleadings, proceedings and proofs herein filed on behalf of the above parties; and having been argued by their respective advocates; and after due proceedings had;

on motion of John M. Scoble, Esq., proctor for the libellant; and due deliberation having been had, it is hereby

Ordered, adjudged and decreed, as follows:

That the libellant, Livingston H. McCrea, recover of and from the United States of America, respondent herein, the [fol. 165] sum of $28.95, constituting the wages due the libellant at the time of the demand therefore, to-wit, the 26th day of February, 1928; and that libellant recover in addition the further sum of $40.00 for loss of clothing and effects, making the total sum of $68.95, with interest thereon from the 26th day of February, 1928, to the date hereof, amounting to $21.37 together with libellant's costs as taxed, in the amount of $42.50, amounting in all to the sum of $132.82, with interest thereon at 4% per annum until paid.

Filed Mar. 9, 1933.

John C. Knox, U. S. D. J.

In United States District Court, Southern District of New York

[Title omitted]

Notice of Appeal

Please take notice that Livingston H. McCrea, libellant in the above entitled action, hereby appeals to the United [fol. 166] States Circuit Court of Appeals, for the Second Circuit, from each and every part of the final decree herein, dated the 8th day of March, 1933, and entered on the 8th day of March, 1933, in the office of the Clerk of the United States District Court, Southern District of New York, except that part of said decree which awards to the libellant the sum of $28.95, constituting the wages due the libellant at the time of the demand therefor, and the sum of $40.00 for loss of clothing and effects.

Dated New York, March 15th, 1933.

Yours, etc., John M. Scoble, Esq., Proctor for Libellant, Office & Post Office Address: 55 Liberty Street, Borough of Manhattan, City of New York.

To George Z. Medalie, Esq., United States Attorney, Proctor for Respondent, 45 Broadway, New York City.

[fol. 167] In United States District Cou , Southern District of New York

[Title omitted]

Petition for Appeal

To the Honorable John C. Knox:

The above named libellant, Livingston H. McCrea, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 8th day of March, 1933, does hereby appeal from said decree to the Circuit Court of Appeals for the Second Circuit for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Second Circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that, this being an action and appeal by a seaman for wages, no security or bond be required of him, as provided for by the United [fol. 168] States Code, Title 28, Sec. 837 (July 12, 1917, C. 27, Sec. 1, 40 Stat. 157; July 1, 1918, C. 113, Sec. 1; 40 Stat. 683).

Dated New York, May 15th, 1933.

John M. Scoble, Esq., Proctor for Libellant, Office & Post Office Address: 55 Liberty Street, Borough of Manhattan, City of New York.

In United States District Court

[Title omitted]

Order Allowing Appeal

On motion of John M. Scoble, Esq., proctor for libellant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals, Second Circuit, from the decree heretofore filed and entered herein on or about the 8th day of March, 1933, be, and the same is hereby allowed, and that

a certified transcript of the record, testimony, exhibits, [fol. 169] stipulations, and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals, Second Circuit.

It is further ordered that, this being an action by a seaman for wages, no bond on appeal be required of him.

Dated New York, May 16th, 1933.

Alfred C. Coxe, U. S. D. J.

In United States District Court

[Title omitted]

Assignment of Errors

The libellant, Livingston H. McCrea, hereby assigns errors in the rulings and proceedings of the United States District Court, Southern District of New York herein, upon which he will rely upon his prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 8th day of March, 1933.

[fol. 170] 1. The District Court erred in refusing to find that the Master was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant.

2. The District Court erred in refusing to find that the Master was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

3. The District Court erred in finding that the Master was not required to pay to the libellant one month's wages

over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

[fol. 171] 4. The District Court erred in refusing to find that R. S. 4583 (46 U. S. C. A. 685) applied to complaints by seamen of violation of Sec. 2 of the Seamen's Act, (Mar. 4, 1915, C. 153, Sec. 2; 38 Stat. 1164; 46 U. S. C. A. Sec. 673).

5. The District Court erred in refusing to find that the Master of the Steamship "American Shipper," having failed to comply with Sec. 2 of the Seamen's Act (38 Stat. 1164; 46 U. S. C. A. Sec. 673), was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

6. The District Court erred in finding that the exclusive remedy of the libellant, for the violation of Sec. 2 of the Seamen's Act, (Mar. 4, 1915, C. 153, Sec. 2; 38 Stat. 1164; 46 U. S. C. A. 673) by the Master, was his discharge from the vessel and the receipt of wages earned.

7. The District Court erred in refusing to find that his discharge from the vessel and the receipt of wages earned was not the exclusive remedy of the libellant for the violation of Sec. 2 of the Seamen's Act (38 Stat. 1164; 46 U. S. C. A. 673) by the Master.

[fol. 172] 8. The District Court erred in refusing to find that the libellant was entitled to one month's wages over and above the wages due at the time of his discharge, and adequate employment on board some other vessel, or passage on board some other vessel bound to port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon

by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

9. The District Court erred in finding that the libellant was not entitled to one month's wages over and above the wages due at the time of his discharge, and adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

10. The District Court erred in finding that the compensation and relief, provided for in Sec. 2 of the Seamen's Act of March 14, 1915 (46 U. S. C. A. 673), is the only and exclusive relief for the violation of said statute.

11. The District Court erred in finding that the compensation and relief, provided by R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is penal.

[fol. 173] 12. The District Court erred in finding that the compensation and relief, provided by R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is a penalty.

13. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is not penal.

14. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is not a penalty.

15. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is remedial.

16. The District Court erred in finding that the compensation and relief, equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages, as pro-

vided for by R. S. 4529 (46 U. S. C. A. 596), are not wages or compensation.

17. The District Court erred in refusing to find that the compensation and relief, equal to two days' pay for each [fol. 174] and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages, as provided for by R. S. 4529 (46 U. S. C. A. 596), are wages or compensation.

18. The District Court erred in finding that the respondent, the United States of America, is not liable to the libellant for a sum equal to two days' pay for each and every day during which payment to him is delayed beyond the respective periods, as provided for in R. S. 4529 (46 U. S. C. A. 596).

19. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, the relief provided for in R. S. 4529 (46 U. S. C. A. 596).

20. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, from the time of his discharge, or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein.

21. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, from the time of his discharge, [fol. 175] or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein, in accordance with the provisions of R. S. 4529 (46 U. S. C. A. 596).

22. The District Court erred in refusing to find that the respondent, the United States of America, was required to pay to the libellant, from the time of his discharge, or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein, in accordance with the provisions of R. S. 4529 (46 U. S. C. A. 596).

23. The District Court erred in finding that the relief, provided for in R. S. 4529 (46 U. S. C. A. 596), is in the nature of a penalty or punishment and cannot be recovered from the respondent, the United States of America.

24. The District Court erred in refusing to find that the relief, provided for in R. S. 4529 (46 U. S. C. A. 596), was embraced in the contract or shipping articles entered into by the libellant.

25. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (46 U. S. C. A. 596), of a sum equal to two days' pay for each and every day during which payment of wages to the libellant [fol.176] is delayed beyond the respective periods, is compensation or wages.

26. The District Court erred in finding that the compensation and relief, provided for in R. S. 4529 (46 U. S. C. A. 596), of a sum equal to two days' pay for each and every day during which payment of wages to the libellant is delayed beyond the respective periods, is not compensation or wages.

27. The District Court erred in refusing to find that R. S. 4529 (46 U. S. C. A. 596) furnished a clear and well defined rule of damages between the libellant and the Master of the Steamship "American Shipper" for a breach of contract.

28. The District Court erred in finding that R. S. 4529 (46 U. S. C. A. 596) did not furnish a clear and well defined rule of damages between the libellant and the Master of the Steamship "American Shipper" for a breach of contract.

29. The District Court erred in refusing to find that R. S. 4529 (46 U. S. C. A. 596) provided a reasonable rule of compensation for breach of contract.

30. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3 and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the [fol. 177] United States of America, waived any right or immunity it might claim for any liability under R. S. 4529 (46 U. S. C. A. 596).

31. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S.

C. A. 741, 742, 743, and 746), the respondent, the United States of America, waived any immunity from liability and consented to be sued in any admiralty proceeding in which a private owner would be liable, providing the vessel through which the liability arose was operated as a merchant vessel.

32. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95: 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, took upon itself the same obligation that is imposed upon others in the business of operating merchant vessels by the statutes of the United States or otherwise.

33. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95: 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), there was imposed upon the respondent, the United States of America, the same in personam liability as that of any other owner of a merchant vessel.

[fol. 178] 34. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95: 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), there was imposed upon the respondent, the United States of America, the same liability in a proceeding in admiralty as that of any other owner of a merchant vessel.

35. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95: 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, consented that the same in personam liability be imposed upon it as upon any other owner of a merchant vessel.

36. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95: 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United

States of America, consented that the same liability in a proceeding in admiralty be imposed upon it as upon any other owner of a merchant vessel.

37. The District Court erred in refusing to find that in this proceeding there is no attempt to prosecute the United States of America or its agents criminally.

38. The District Court erred in refusing to find that the respondent having admitted in its answer that the action [fol. 179] was one for wages and was within the admiralty and marine jurisdiction of the Federal Courts, and having made no motion to amend its answer, it was not entitled to raise the affirmative defense that the statutes, under which the action was brought, did not apply to the respondent.

39. The District Court erred in refusing to find that the libellant was entitled to one month's additional wages and the amount of expenses incurred by the libellant in securing transportation back to the United States, and also to two days' pay for each of the days the wages due the libellant were not paid to him from the time they were demanded or four days thereafter.

Wherefore, the libellant prays that said Decree be reversed, except as to that part which finds that the libellant was entitled to his discharge, the wages earned, and compensation for loss of clothing and effects, and that said District Court for the Southern District of New York be ordered to enter a Decree reversing the decision of said Court in said cause.

John M. Scoble, Esq., Proctor for Libellant, Office & Post Office Address: 55 Liberty Street, Borough of Manhattan, City of New York.

[fol. 180] Citation in usual form, filed May 18, 1933, omitted in printing

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[fol. 181] In United States District Court, Southern District of New York

[Title omitted]

Notice of Motion to Amend Decree

Sir: Please take notice that upon the attached affidavit of William E. Collins, verified July 5, 1933, the respondent

will move before Hon. John C. Knox, District Judge, at his Chambers in the Woolworth Building, 233 Broadway, New York City, on the 18th day of July, 1933, at 4:30 P. M., for an order in the form hereto attached, amending and resettling the final decree entered herein on March 8, 1933, as set forth in the attached proposed order, and for such other and further relief as to the Court may seem proper.

Dated New York, N. Y., July 15, 1933.

Yours, etc., George Z. Medalie, United States Attorney, Proctor for Respondent, Office & P. O. Address: 45 Broadway, Borough of Manhattan, New York City.

[fol. 182] To John M. Scoble, Esq., Proctor for Libellant, 55 Liberty Street, New York City.

At a Stated Term of the United States District Court for the Southern District of New York, Held in the Court-Rooms Thereof, in the Woolworth Building, Borough of Manhattan, City of New York, on the — Day of July, 1933

A 99-118

Livingston H. McCrea, Libellant,

against

United States of America, as Owner of the Steamship American Shipper, Her Engines, Tackle, Apparatus, etc., Respondent.

Present: Honorable John C. Knox, District Judge.

Proposed Order Amending Final Decree, Attached to Moving Papers

Upon the attached affidavit of William E. Collins, Special Assistant to the United States Attorney, verified the 5th day of July, 1933, upon the subjoined consent of John M. [fol. 183] Scoble, Esq., proctor for libellant, and upon all the proceedings heretofore had herein, it is on motion of George Z. Medalie, United States Attorney,

Ordered that the final decree entered herein on the 8th day of March, 1933, be and the same hereby is amended and resettled so as to read as follows:

"At a Stated Term of the United States District Court for the Southern District of New York, Held in the Court Rooms Thereof, in the Woolworth Building, Borough of Manhattan, City of New York, on the 8th Day of March, 1933.

A 99-118

Livingston H. McCrea, Libellant,

against

United States of America, as Owner of the Steamship American Shipper, Her Engines, Tackle, Apparatus, etc., Respondent.

Present: Honorable John C. Knox, District Judge.

The above entitled cause having come on to be heard upon the pleadings, proceedings and proofs herein filed on behalf of the above parties; and having been argued by their respective advocates; and after due proceedings had; on motion of John M. Scoble, Esq., proctor for the libellant; [fol. 184] and due deliberation having been had, it is hereby

Ordered, adjudged and decreed, as follows:

That the libellant, Livingston H. McCrea, recover of and from the United States of America, respondent herein, the sum of $28.95, constituting the wages due the libellant at the time of the demand therefor, to-wit, the 26th day of February, 1928; and that libellant recover in addition the further sum of $40.00 for loss of clothing and effects, making a total sum of $68.95, with interest thereon from the 26th day of February, 1928 to the date hereof, amounting to $21.37 together with libellant's costs as taxed, in the amount of $42.50, amounting in all to the sum of $132.82, with interest thereon at 4% until paid; and it is further

Ordered that the final decree in favor of libellant, entered herein on the 15th day of August, 1932, be and the same hereby is in all respects vacated and set aside.

Jno. C. Knox, U. S. D. J."

[fol. 185] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF WILLIAM E. COLLINS, IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

William E. Collins, being duly sworn, deposes and says:

I am Special Assistant to the United States Attorney and have charge of the above entitled case, with the proceedings in which I am familiar.

Pursuant to opinion of Hon. John C. Knox, District Judge, rendered on July 26, 1932, recovery was granted to libellant for certain wages alleged to have been wrongfully withheld, together with the penalty of two days' pay for each day during which payment of wages was delayed, pursuant to Section 3 of the Seaman's Act (46 U. S. C. A., Sec. 596). In accordance therewith, a decree in favor of the libellant was entered on August 15, 1932, signed by Judge Knox, in favor [fol. 186] of the libellant and against the respondent, in the amount of $6,456.83, with interest thereon @ 4% per annum until paid.

Thereafter, upon the suggestion of counsel for the respondent, that the United States of America is not subject to the imposition of the penalty provided in the aforesaid statute, the Court granted a reargument, and upon such reargument held, in a supplemental opinion dated February 10, 1933, that the United States was not subject to such penalty. In accordance with said supplemental opinion, a decree was entered herein on the 8th day of March, 1933, in favor of libellant and against respondent, in the amount of $132.82 with interest thereon @ 4% per annum until paid.

In connection with the appeal taken by libellant from the last mentioned decree, my attention has been called to the fact that said decree entered March 8, 1933 does not vacate or set aside, or in any way refer to the previous decree of August 15, 1932. This is due to inadvertence, as at the time the second decree was prepared it was my impression that no decree had been entered on the Court's first opinion rendered before the reargument.

It is therefore respectfully requested that the annexed order be entered herein amending the said decree of March 8, 1933 so as to provide, as set forth in the attached order, [fol. 187] that the decree entered herein on August 15, 1932 be in all respects vacated and set aside.

William E. Collins.

Sworn to before me this 5th day of July, 1933. Albert L. Fager, Notary Public, New York County No. 2. New York Co. Register's No. 4-F-301. My Commission expires March 30, 1934. (Seal.)

In United States District Court

[Title omitted]

Affidavit of John M. Scoble, in Opposition to Motion—Filed July 19, 1933

State of New York,
County of New York, ss:

John M. Scoble, being duly sworn, says: That he is the proctor for the libellant in the above entitled action. [fol. 188] That on or about the twelfth day of August, 1932, a decree was duly made in the said action, which read as follows:

"At a Stated Term of the United States District Court for the Southern District of New York, Held at the Court Rooms Thereof in the Woolworth Building, Borough of Manhattan, City of New York, on the 12th Day of August, 1932.

A 99-118

Livingston H. McCrea, Libellant,
against

United States of America, as owner of the Steamship 'American Shipper,' Her Engines, Tackle, Apparatus, etc., Respondent

Present: Honorable John C. Knox, District Judge.

The above entitled cause having come on to be heard upon the pleadings, proceedings and proofs herein filed on behalf of the above parties; and having been argued by their respective advocates; and after due proceedings had; on mo-

tion of John M. Scoble, Esq., proctor for the libellant; and due deliberation having been had, it is hereby

Ordered, adjudged, and decreed, as follows:

[fol. 189] That the libellant, Livingston H. McCrea, recover of and from the United States of America, respondent herein, the sum of $28.95, constituting the wages due the libellant at the time of the demand, to wit, the 26th day of February, 1928; and that libellant recover in addition, two days' pay for one, namely, at the rate of $4.33 per day or $130.00 per month, from the 11th day of July, 1928, the date of the commencement of this suit, to the 12th day of August, 1932, the date of the entry of this decree, to wit, the sum of $6,374.33, together with the sum of $42.50 libellant's costs as taxed, together with the further sum of $40.00 for loss of clothing and effects, amounting in all to the sum of $6,456.83, with interest thereon at 4% per annum until paid.

Jno. C. Knox, CW., United States District Judge.

Filed August 15, 1932."

That the said decree was duly filed and entered in the office of the Clerk of this Court on or about the 15th day of August, 1932.

That on or about the thirteenth day of August, 1932, the proctor for the respondent herein made an application to the Court for a rehearing in the said case. In the said application for a rehearing the respondent asked that the signing of the decree be delayed.

[fol. 190] That the application for the said rehearing consisted only of a letter to the Court, a copy of which was sent to the deponent. That the said letter read as follows:

"August 13, 1932.

Docket No. A99-118

LIVINGSTON MCCREA,

v.

UNITED STATES—S. S. 'American Shipper'

Hon. John C. Knox, United States District Judge, Woolworth Building, New York City.

MY DEAR JUDGE KNOX: Since reading your Honor's opinion in the above entitled case, in which a decree has been

presented awarding to the libellant penalties against the United States for withholding wages, under the provisions of 46 U. S. C. A. 596, my attention has been called to the decision of Judge Goddard in Corrigan v. United States, 298 Fed. 610, 613, in which it was squarely held that under the same statute penalties could not be imposed against the United States. The decision cites the Supreme Court case, to the same effect, of Missouri Pacific R. R. Co. and Director General v. Ault, 256 U. S. 554, 563.

[fol. 191] I am unable to find any decisions to the contrary.

It seems to me, therefore, that a motion for rehearing should be granted in this case. Unfortunately I had planned to leave on a vacation on the 17th, and I understand that Mr. Scoble, proctor for the libellant, is now away, and would suggest, if agreeable to your Honor, that the signing of any decree be deferred at this time so that a motion for reargument can be made at a later date convenient to the Court and counsel.

I am sending a copy of this letter to Mr. Scoble.

Respectfully, William E. Collins, Special Assistant to the United States Attorney.

CC to John M. Scoble, Esq., 55 Liberty Street, New York City.

WEC:MG"

In the application, the respondent stated "that a motion for rehearing should be granted," and suggested "that the signing of any decree be deferred" * * * "so that a motion for reargument can be made at a later date."

That on or about the thirtieth day of August, 1932, the Court granted a rehearing in the said suit, saying:

[fol. 192] "UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A 99-118

LIVINGSTON H. MCCREA, Libellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship 'American Shipper,' Her Engines, Tackle, Apparatus, etc., Respondent

Memorandum

In view of the decision in Corrigan vs. United States, 298 Fed. 610, which has now been brought to my attention for the first time, I will grant a rehearing in the above entitled suit. Counsel for the parties may arrange a time for rehearing by communicating with my secretary.

August 30, 1932.

Jno. C. Knox, U. S. D. J."

No petition or motion to vacate or amend or modify the decree of August 12, 1932, was ever made.

In the opinion of February, 1933, the Honorable Court said:

[fol. 193] "By memorandum opinion, dated August 30, 1932, a reargument of this case was granted."

And further:

"The decision previously rendered is modified so as to eliminate libellant's recovery of two days' pay for each day since the date upon which he was entitled to his discharge."

In the proposed order herein it is stated that it is granted on the consent of the proctor for the libellant. This is not so. If the order be granted, it should recite that the libellant appeared and opposed the motion.

John M. Scoble.

Subscribed and sworn to before me this 18th day of July, 1933. Walter B. Brady, Notary Public, Kings County. Kings Co. Clks. No. 787, Reg. No. 5380. N. Y. Co. Clks. No. 837, Reg. No. 5B509. Bronx Co. Clks. No. 40, Reg. No. 160B35. Commission expires March 30, 1935.

[File endorsement omitted.]

[fol. 194] IN UNITED STATES DISTRICT COURT

A 99-118

LIVINGSTON H. MCCREA, Libellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper," Her Engines, Tackle, Apparatus, etc., Respondent

Present: Honorable John C. Knox, District Judge.

ORDER AMENDING FINAL DECREE—July 18, 1933

Upon the attached affidavit of William E. Collins, Special Assistant to the United States Attorney, verified the 5th day of July, 1933, upon the affidavit of John M. Scoble of July 18, 1933, and over the opposition of John M. Scoble, Esq., proctor for libellant, and upon all the proceedings heretofore had herein, it is on motion of George Z. Medalie, United States Attorney,

Ordered that the final decree entered herein on the 8th day of March, 1933, be and the same hereby is amended and resettled so as to read as follows:

[fol. 195] "AT A STATED TERM OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTICT OF NEW YORK, HELD IN THE COURT ROOMS THEREOF, IN THE WOOLWORTH BUILDING, BOROUGH OF MANHATTAN, CITY OF NEW YORK, ON THE 8TH DAY OF MARCH, 1933

A 99-118

LIVINGSTON H. MCCREA, Libellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper," Her Engines, Tackle, Apparatus, etc., Respondent

Present: Honorable John C. Knox, District Judge.

The above entitled cause having come on to be heard upon the pleadings, proceedings and proofs herein filed on be-

half of the above parties; and having been argued by their respective advocates; and after due proceedings had; on motion of John M. Scoble, Esq., proctor for the libellant; and due deliberation having been had, it is hereby

Ordered, adjudged and decreed, as follows:

That the libellant, Livingston H. McCrea, recover of and from the United States of America, respondent herein, the [fol. 196] sum of $28.95, constituting the wages due the libellant at the time of the demand therefor, to-wit, the 26th day of February, 1928; and that libellant recover in addition the further sum of $40.00 for loss of clothing and effects, making the total sum of $68.95, with interest thereon from the 26th day of February, 1928, to the date hereof, amounting to $21.37 together with libellant's costs as taxed, in the amount of $42.50, amounting in all to the sum of $132.82, with interest thereon at 4% until paid; and it is further

Ordered that the final decree in favor of libellant, entered herein on the 15th day of August, 1932, be and the same hereby is in all respects vacated and set aside.

Jno. C. Knox, U. S. D. J."

Dated New York, N. Y., July 18, 1933.

Filed July 19, 1933.

[fol. 197] In United States District Court

[Title omitted]

Notice of Appeal—Filed August 10, 1933

Please take notice that Livingston H. McCrea, libellant in the above entitled action, hereby appeals to the United States Circuit Court of Appeals, for the Second Circuit, from each and every part of the amended decree or order herein, dated the 18th day of July, 1933, and entered on the 19th day of July, 1933, in the office of the Clerk of the United States District Court, Southern District of New York.

That the libellant also appeals from the memorandum decision of said District Court, dated the 30th day of August,

1932, granting the motion for the reargument of said case.
Dated New York, August 7th, 1933.

Yours, etc., John M. Scoble, Proctor for Libellant, Office & P. O. Address: 55 Liberty Street, Borough of Manhattan, City of New York.

[fol. 198] To George Z. Medalie, Esq., United States Attorney, Proctor for Respondent, 45 Broadway, New York City.

[File endorsement omitted.]

In United States District Court, Southern District of New York

[Title omitted]

Assignments of Error—Filed August 10, 1933

The libellant, Livingston H. McCrea, hereby assigns errors in the rulings and proceedings of the United States District Court, Southern District of New York, herein, upon which he will rely upon his prosecution of the appeal in the above entitled cause from the amended decree or order made by this Honorable Court on the 18th day of July, 1933, and entered on the 19th day of July, 1933.

[fol. 199] 1. The District Court erred in refusing to find that the Master was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant.

2. The District Court erred in refusing to find that the Master was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the

United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

3. The District Court erred in finding that the Master was not required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

[fol. 200] 4. The District Court erred in refusing to find that R. S. 4583 (46 U. S. C. A. 685) applied to complaints by seamen of violation of Sec. 2 of the Seamen's Act (Mar. 4, 1915, C. 153, Sec. 2; 38 Stat. 1164; 46 U. S. C. A. Sec. 673).

5. The District Court erred in refusing to find that the Master of the Steamship "American Shipper," having failed to comply with Sec. 2 of the Seamen's Act (38 Stat. 1164; 46 U. S. C. A. Sec. 673), was required to pay to the libellant one month's wages over and above the wages due at the time of his discharge, and to provide him with adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

6. The District Court erred in finding that the exclusive remedy of the libellant, for the violation of Sec. 2 of the Seamen's Act (Mar. 4, 1915, C. 153, Sec. 2; 38 Stat. 1164; 46 U. S. C. A. 673), by the Master, was his discharge from the vessel and the receipt of wages earned.

7. The District Court erred in refusing to find that his discharge from the vessel and the receipt of wages earned was not the exclusive remedy of the libellant for the violation of Sec. 2 of the Seamen's Act (38 Stat. 1164; 46 U. S. C. A. 673) by the Master.

[fol. 201] 8. The District Court erred in refusing to find that the libellant was entitled to one month's wages over and above the wages due at the time of his discharge, and adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

9. The District Court erred in finding that the libellant was not entitled to one month's wages over and above the wages due at the time of his discharge, and adequate employment on board some other vessel, or passage on board some other vessel bound to the port from which the libellant originally shipped, or to the most convenient port of entry in the United States, or to a port agreed upon by the libellant, in accordance with the provisions of R. S. 4583 (46 U. S. C. A. 685).

10. The District Court erred in finding that the compensation and relief, provided for in Sec. 2 of the Seamen's Act of March 14, 1915 (46 U. S. C. A. 673), is the only and exclusive relief for the violation of said statute.

11. The District Court erred in finding that the compensation and relief, provided by R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is penal.

[fol. 202] 12. The District Court erred in finding that the compensation and relief, provided by R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is a penalty.

13. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is not penal.

14. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec. 21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is not a penalty.

15. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (Dec.

21, 1898, C. 28, Sec. 4, 30 Stat. 756; Mar. 4, 1915, C. 153, Sec. 3, 38 Stat. 1164; 46 U. S. C. A. 596), is remedial.

16. The District Court erred in finding that the compensation and relief, equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages, as provided for by R. S. 4529 (46 U. S. C. A. 596), are not wages or compensation.

17. The District Court erred in refusing to find that the compensation and relief, equal to two days' pay for each [fol. 203] and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages, as provided for by R. S. 4529 (46 U. S. C. A. 596), are wages or compensation.

18. The District Court erred in finding that the respondent, the United States of America, is not liable to the libellant for a sum equal to two days' pay for each and every day during which payment to him is delayed beyond the respective periods, as provided for in R. S. 4529 (46 U. S. C. A. 596).

19. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, the relief provided for in R. S. 4529 (46 U. S. C. A. 596).

20. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, from the time of his discharge, or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein.

21. The District Court erred in refusing to find that the libellant was entitled to recover from the respondent, the United States of America, from the time of his discharge, [fol. 204] or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein, in accordance with the provisions of R. S. 4529 (46 U. S. C. A. 596).

22. The District Court erred in refusing to find that the respondent, the United States of America, was required to

pay to the libellant, from the time of his discharge, or four days thereafter, a sum equal to two days' pay for each and every day during which payment to him was delayed beyond the respective periods, to the date of the entry of the decree herein, in accordance with the provisions of R. S. 4529 (46 U. S. C. A. 596).

23. The District Court erred in finding that the relief, provided for in R. S. 4529 (46 U. S. C. A. 596), is in the nature of a penalty or punishment and cannot be recovered from the respondent, the United States of America.

24. The District Court erred in refusing to find that the relief, provided for in R. S. 4529 (46 U. S. C. A. 596), was embraced in the contract or shipping articles entered into by the libellant.

25. The District Court erred in refusing to find that the compensation and relief, provided for in R. S. 4529 (46 U. S. C. A. 596), of a sum equal to two days' pay for each and every day during which payment of wages to the libel-[fol. 205] lant is delayed beyond the respective periods, is compensation or wages.

26. The District Court erred in finding that the compensation and relief, provided for in R. S. 4529 (46 U. S. C. A. 596), of a sum equal to two days' pay for each and every day during which payment of wages to the libellant is delayed beyond the respective periods, is not compensation or wages.

27. The District Court erred in refusing to find that R. S. 4529 (46 U. S. C. A. 596) furnished a clear and well defined rule of damages between the libellant and the Master of the Steamship "American Shipper" for a breach of contract.

28. The District Court erred in finding that R. S. 4529 (46 U. S. C. A. 596) did not furnish a clear and well defined rule of damages between the libellant and the Master of the Steamship "American Shipper" for a breach of contract.

29. The District Court erred in refusing to find that R. S. 4529 (46 U. S. C. A. 596) provided a reasonable rule of compensation for breach of contract.

30. The District Court erred in refusing to find that, under the Suits in Admiralty Act, (Mar. 9, 1920, C. 95; 41

Stat. 525), and especially sections 1, 2, 3 and 6 thereof, (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the [fol. 206] United States of America, waived any right or immunity it might claim for any liability under R. S. 4529 (46 U. S. C. A. 596).

31. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, waived any immunity from liability and consented to be sued in any admiralty proceeding in which a private owner would be liable, providing the vessel through which the liability arose was operated as a merchant vessel.

32. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, took upon itself the same obligation that is imposed upon others in the business of operating merchant vessels by the statutes of the United States or otherwise.

33. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), there was imposed upon the respondent, the United States of America, the same in personam liability as that of any other owner of a merchant vessel.

[fol. 207] 34. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1, 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), there was imposed upon the respondent, the United States of America, the same liability in a proceeding in admiralty as that of any other owner of a merchant vessel.

35. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; Stat. 525), and especially sections 1, 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, consented that the same in per-

sonam liability be imposed upon it as upon any other owner of a merchant vessel.

36. The District Court erred in refusing to find that, under the Suits in Admiralty Act (Mar. 9, 1920, C. 95; 41 Stat. 525), and especially sections 1. 2, 3, and 6 thereof (46 U. S. C. A. 741, 742, 743, and 746), the respondent, the United States of America, consented that the same liability in a proceeding in admiralty be imposed upon it as upon any other owner of a merchant vessel.

37. The District Court erred in refusing to find that in this proceeding there is no attempt to prosecute the United States of America or its agents criminally.

38 The District Court erred in refusing to find that the respondent having admitted in its answer that the action was one for wages and was within the admiralty and marine [fol. 208] jurisdiction of the Federal Courts, and having made no motion to amend its answer, it was not entitled to raise the affirmative defense that the statutes, under which the action was brought, did not apply to the respondent.

39. The District Court erred in refusing to find that the libellant was entitled to one month's additional wages and the amount of expenses incurred by the libellant in securing transportation back to the United States, and also to two days' pay for each of the days the wages due the libellant were not paid to him from the time they were demanded or four days thereafter.

40. The District Court erred in granting the reargument of the case in its memorandum decision of August 30th, 1932, a final degree therein having already been made August 12th, 1932, and entered August 15th, 1932.

41. The District Court erred in making and entering the judgment or decree, dated March 8th, 1933 (or March 9th, 1933), there being a final decree in the matter made the 12th day of August, 1932, and entered the 15th day of August, 1932.

42. The District Court erred in granting the motion to vacate the final judgment or decree, made August 12th, 1932, and entered August 15th, 1932.

[fol. 209] 43. The District Court erred in not denying the motion to vacate the final judgment or decree, made August 12th, 1932, and entered August 15th, 1932.

44. The District Court erred in making and entering the amended decree or order, dated the 18th day of July, 1933, amending the decree in this case of March 8th, 1933 (or March 9th, 1933), ordering and directing that the final decree, made the 12th day of August, 1932, and entered the 15th day of August, 1932, be vacated and set aside.

Wherefore, the libellant prays that said amended decree or order be reversed and that said District Court for the Southern District of New York be ordered to enter a decree reversing the decision of said Court in said cause.

John M. Scoble, Proctor for Libellant-Appellant, Office & P. O. Address: 55 Liberty Street, Borough of Manhattan, City of New York.

[File endorsement omitted.]

[fol. 210] In United States District Court, Southern District of New York

[Title omitted]

Petition for Appeal—Filed Aug. 10, 1933

To the Honorable Judges of the United States District Court for the Southern District of New York:

The above named libellant, Livingston H. McCrea, feeling aggrieved by the amended decree or order made and rendered in the above entitled cause on the 18th day of July, 1933, and entered on the 19th day of July, 1933, does hereby appeal from said amended decree or order to the Circuit Court of Appeals for the Second Circuit for the reasons set forth in the assignments of error filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said amended decree or order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for

the Second Circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that, this being an action and appeal by a seaman for wages, no security or bond [fol. 211] be required of him, as provided for by the United States Code, Title 28, Sec. 837 (July 12, 1917, C. 27, Sec. 1, 40 Stat. 157; July 1, 1918, C. 113, Sec. 1; 40 Stat. 683).

Dated New York, August 7th, 1933.

John M. Scoble, Proctor for Libellant-Appellant, Office & P. O. Address: 55 Liberty Street, Borough of Manhattan, City of New York.

[File endorsement omitted.]

In United States District Court, Southern District of New York

[Title omitted]

Order Allowing Appeal—Filed Aug. 10, 1933

On motion of John M. Scoble, Esq., proctor for libellant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals, Second Circuit, from the amended decree or order heretofore filed and entered herein on or about the 19th day of July, 1933, and from the order [fols. 212 & 213] of the District Court made the 12th day of August, 1932, and entered the 15th day of August, 1932, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals, Second Circuit.

It is further ordered that, this being an action by a seaman for wages, no bond on appeal be required of him.

Dated New York, August 10th, 1933.

Robert P. Patterson, U. S. D. J.

[File endorsement omitted.]

Citation in usual form, filed Aug. 16, 1933, omitted in printing.

[fol. 214] In United States District Court, Southern District of New York

[Title omitted]

Stipulation Settling Case

It is hereby stipulated and agreed by and between the proctors for the above entitled parties that the foregoing is a true and correct transcript of record of the District Court in this action as agreed upon by the parties.

Dated New York, October 11th, 1933.

John M. Scoble, Proctor for Libellant. George Z. Medalie, Proctor for Respondent.

[fol. 215] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 216] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

LIVINGSTON H. MCCREA, Libellant-Appellant,

against

UNITED STATES OF AMERICA, as Owner of the Steamship "American Shipper", Engines, Tackle, Apparatus, etc., Respondent-Appellee

Before L. Hand, Swan and Chase, Circuit Judges

In Admiralty. Appeal from a decree of the District Court for the Southern District of New York. Affirmed.

John M. Scoble, Esq., Proctor for Libellant; K. Courtenay Johnston, Esq., of Counsel.

Martin Conboy, Esq., United States Attorney; William E. Collins, Esq., Special Assistant, United States Attorney, Advocate.

CHASE, Circuit Judge:

The libellant shipped as a fireman on the S. S. American Shipper on a voyage from New York to London. The steamer left New York February 15, 1928 and arrived at London the following February 26th. It was owned by the United States and was a merchant vessel subject to the provisions of Sec. 2 of the Seamen's Act of March 4, 1915 (46 [fol. 217] U. S. C. A. Sec. 673) relating to watches; their duties; and their right to discharge.

There were thirteen seamen on the vessel and they were not, while at sea, divided as equally as that number permitted into watches and kept on duty successively as the above statute required. Instead of this, there were three watches of three men each and the remaining four were kept on day duty and not included in any watch.

This libellant had made himself somewhat familiar with the provisions of the Seamen's Act before signing on and also with the decision of the Supreme Court in O'Hara v. Luckenbach S. S. Co., 269 U. S. 364. One of his reasons for becoming a member of the crew of this ship was to take advantage of any violation of the law. He made no complaint during the voyage but after the ship docked at Lon-

don and while the captain was paying the crew about to go on shore leave, one half of their wages, demanded his discharge with full pay; additional wages for one month; and his passage home on the ground that the seamen had not been divided into equal watches. He then told the captain he was making his demand under Sec. 2 of the Seamen's Act and Sec. 4583 R. S. and refused to accept half his wages. The master told him he didn't know what these sections of the statute were about and would have to look them up and asked the libellant to meet him at the office of the American Consul in London just after noon the next day. He gave libellant the address of the American Consulate and told [fol. 218] him they would talk the matter over there. The appellant went to the Consulate the next morning and waited until half past eleven when he left after stating his complaint and being informed that he was not entitled to a discharge. He requested a written decision, and after complying with a request to put his complaint in writing, one to like effect was sent addressed to him in care of the ship. The captain, who had been busy preparing his papers for entry at the Customs House, got to the Consulate about two o'clock that day and was told that the appellant had been there and gone. He then returned to the ship where he remained most of the time it was in port but did not see the appellant again.

The appellant testified that he returned from the Consulate to the ship; knocked on the captain's door that night and again the next morning but received no answer at either time. He then asked the chief mate if the captain was aboard and the mate said he didn't know. When he asked the mate for a pass for his clothes he was told that the mate couldn't give him one and he was not allowed to take his clothes when he left the ship soon afterward without any other attempt to see the captain or leaving any information which would enable the captain to communicate with him. He did not intend to return to the ship when he left and never did return but spent about three weeks visiting relatives in England. Becoming somewhat alarmed about his status in England as an alien who had deserted his ship, he then purchased his passage on another vessel and re- [fol. 219] turned to the United States. He brought this action on July 11, 1928.

On August 15, 1932, a decree dated August 12, 1932, was entered in the District Court under which the appellant

was awarded the wages due him when he demanded them in London on February 26, 1928; the value of his clothing and effects left on the ship and twice his pay from the commencement of this action to the date of the decree. On August 13, 1932, an assistant United States Attorney wrote the judge a letter in which his attention was called to Missouri Pacific R. R. Co. and Director General v. Ault, 256 U. S. 554, 563 and to Corrigan v. United States, 298 Fed. 610, 613 on the question of the liability of the government for a penalty and a rehearing was requested. On August 30, 1932, a rehearing was granted.

On March 9, 1933, a decree was entered in which the appellant was granted recovery as in the decree of the previous August with the exception of double pay. An order allowing the appellant an appeal from this decree was signed and filed May 16, 1933. On the same day he filed an assignment of errors. Being an action by a seaman for wages, no bond was required. On July 5, 1933 the district attorney moved in the District Court for an order amending and resettling the March decree. The motion was granted and on July 18, 1933 the decree was amended by adding thereto this paragraph; "Ordered that the final decree in favor of libellant, entered herein on the 15th day of August 1932, be and the same is in all respects vacated and set aside." On August 10, 1933 an appeal was allowed in the District Court and new assignments of error were [fol. 220] filed by the libellant which, in addition to the issues previously raised, questioned the power of the District Court to enter the decree of March 1933 and to vacate the August 1932 decree by the amendment to the March decree of July 18, 1933. It is apparent that the entry of the decree of August 15th two days after the request for rehearing was made was irregular. At that time the matter of a rehearing was pending and a rehearing without restriction was granted August 30th. That action vacated the decree which had been entered. Hook v. Mercantile Trust Co. of N. Y., 95 Fed. 41. The decree afterwards entered in March 1933, superseded the decree entered the previous August. Compare, Wolff Packing Co. v. Indus. Court, 267 U. S. 552, 561. The March decree was entered when the matter was still pending in the District Court and when that court had complete jurisdiction. It became the decree of that court. After the appeal was taken from the March

decree, however, the cause was pending in this court and the District Court had no power to take any action in regard to it without our leave. Baltimore S. S. Co. v. Phillips, 9 Fed (2) 902. The amendment to the March decree, made while the appeal was pending here, will, therefore, be disregarded as a nullity.

On the merits the important issue is whether the appellant is entitled to recover double wages under The Seamen's Act, Sec. 4529 R. S. (46 U. S. C. A. 596). The government has taken no appeal. The decision of the District Court that the appellant was not entitled to any double pay was put on the ground that such requirement of the [fol. 221] statute was a penalty not recoverable from the United States.

In Vincent v. United States, 272 Fed. 889, it was held, without discussing the point here raised, that the government was bound to pay double wages to seamen. In Gerber v. Spencer, 278 Fed. 886 it was held that the statute provided for extra compensation entitled to priority in payment as are wages and in Buckley v. Oceanic S. S. Co., 5 Fed. (2) 545 it was held that the double pay was not a penalty. Moreover, in Cox v. Lykes Brothers, 237 N. Y. 376 it was held that for the purpose of determining whether the state court had jurisdiction this statute was not to be taken to provide for a penalty.

In Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554, however, a statute of Arkansas, providing that if a railroad failed to pay an employee his full wages within seven days after discharge his wages should continue at the same rate until he was paid, was held to create a penalty not recoverable from the United States which had not consented to be sued for that purpose.

The statute here involved calls for the payment of double wages while the Arkansas statute was only for pay at the same rate. The penalty element is just twice as pronounced in this statute. It may well be that such a statute has the dual purpose of compensation and punishment behind it. But, in deciding whether the United States has agreed to be liable for double the pay of a seaman whenever one of its agents violates this statute, we believe the dominant purpose of the statute must control and that such purpose is punishment for the violation. In the Arkansas statute the pay for delay was called a penalty while here it is not

[fol. 222] but Justice Brandeis made it perfectly clear in his opinion in the Ault case that the name given to what does more than compensate and does punish is not decisive and double damages is given as an example of what the government has not consented to pay. Even double damages would be much less in degree on the question of punishment than the amount claimed in this case. The wages earned and due the appellant when he demanded his discharge and his pay on February 26, 1928 amounted to $28.95 and he now claims in addition to that with interest, because of the double wage provision of the statute, about $7000.00. Obviously such a sum cannot be merely just compensation for delay in paying the wages earned and we feel bound by the decision in the Ault case to take a view contrary to that which prevailed in the other cases cited in so far as they may be authority for holding that the United States is subject to the double wage provision of the Seamen's Act (46 U. S. C. A. 596).

The appellant also seeks to recover pay for one month and passage to the port at which he shipped, under Sec. 4583 R. S. (46 U. S. C. A. Sec. 685). That section of the statute applies to a seaman who is actually discharged in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment. When a seaman is so discharged by a consular officer, it is the duty of the consul or consular agent after inquiry and upon being satisfied of the truth and justice of the complaint to "require the master to pay to such seaman one month's wages over and [fol. 223] above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman". By its express terms the conditions precedent to its application are both a discharge in accordance with its provisions and consular action requiring the master to pay and provide. It is evident that the appellant, who deserted his ship when he failed to get favorable action from the consul in London on his complaint and was not discharged, has no cause of

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action under this statute since the conditions essential to its application have not been, and cannot be, shown.

Decree affirmed.

[fol. 223a] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Livingston H. McCrea v. U. S. A., owner of Steamship American Shipper. (Copy.) Opinion. Chase, Circuit Judge.

[fol. 224] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 7th day of May, one thousand nine hundred and thirty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

LIVINGSTON H. MCCREA, Libellant-Appellant,

vs.

UNITED STATES, Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 225] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Livingston H. McCrea vs. United States. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 7, 1934. William Parkin, Clerk.

[fol. 226] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 225, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Livingston H. McCrea, Libellant-Appellant, against United States, Respondent-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 8th day of May, in the year of our Lord, one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 227] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,877. U. S. Circuit Court of Appeals, Second Circuit. Term No. 249. Livingston H. McCrea, Petitioner, vs. The United States of America, as Owner of the S. S. "American Shipper," Engines, Tackle, Apparatus, etc. Petition for a writ of certiorari and exhibit thereto. Filed August 3, 1934. File No. 249, O. T., 1934.

FILE COPY

No. 249

AUG 3 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

LIVINGSTON H. McCREA,
Petitioner,

versus

UNITED STATES OF AMERICA, as owner of the S. S. American Shipper, Engines, Tackles, Apparatus, Etc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN M. SCOBLE,
Proctor for Petitioner.

K. COURTENAY JOHNSTON,
of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1933.

LIVINGSTON H. McCREA,
Petitioner,

versus

UNITED STATES OF AMERICA, as owner of the S. S. American Shipper, Engines, Tackle, Apparatus, Etc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of Livingston H. McCrea respectfully shows to this Honorable Court:

A. Summary Statement of the Matters Involved.

(1) The denial of the right of the petitioner to a judgment or decree *in personam* for the statutory double wages, the relief provided by U. S. Code, Title 46, Section 596, incurred by reason of the refusal and neglect of the respondent, the United States, to pay petitioner the wages claimed by him in his libel and found to be due on account of the violation of U. S. Code, Title 46, Section 673 by the respondent, the United States, on the ground that said double wages provided for by said U. S. Code, Title 46, Section 596

did not constitute compensation or wages, but constituted a penalty, and could not be recovered against the respondent, the United States (Assignments of Error Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, R., 172-179; Assignments of Error Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, R., 201-209).

(2) The denial of the right of the petitioner, an unpaid seaman, to a judgment or decree *in personam* for the statutory double wages, the relief provided by U. S. Code, Title 46, Section 596, incurred by reason of the refusal and neglect of the respondent, the United States, to pay petitioner the wages claimed by him in his libel and found to be due on account of the violation of U. S. Code, Title 46, Section 673 by the respondent, the United States, on the ground that said double wages provided for by said U. S. Code, Title 46, Section 596 did not constitute compensation or wages, but constituted a penalty, and could not be recovered against the respondent, the United States; and on the ground that the said respondent, the United States, did not divest itself of all sovereign character and waive immunity by entering into commercial business in competition with private owners and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2, 6, (46 U. S. C. A. 741, 742, 746), (Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 176-178; Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 205-207).

(3) The failure of the United States Circuit Court of Appeals to hold that if the statutory relief of double wages, provided for in U. S. Code, Title 46, Section

596, is a penalty, that the respondent, the United States, divested itself of all sovereign character and waived immunity by entering into commercial business in competition with private owners, and by reason of or under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2, 6, (46 U. S. Code 741, 742, 746), (Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 176-178; Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 205-207).

(4) The failure of the United States Circuit Court of Appeals to hold that Sections 596, 673, 741, 742 and 746 of U. S. Code, Title 46 were parts of the contract between the petitioner herein and the respondent, the United States, and that the respondent, the United States, having violated Section 673 of U. S. Code, Title 46, the petitioner was entitled to all the relief provided for in said Section 673 of U. S. Code, Title 46, and also to the relief provided for in Section 596 of U. S. Code, Title 46, and Section 685 of U. S. Code, Title 46.

(5) The denial of the right of the petitioner, an unpaid seaman discharged in a foreign country, to a judgment or decree *in personam* against the respondent, the United States, for one month's pay and the cost of transportation back to the United States, as provided for in U. S. Code, Title 46, Section 685 (R. S. 4583), in addition to his discharge and wages earned under Section 2 of the Act of March 4, 1915, (46 U. S. Code 672), on the ground that said relief provided for by Section 2 of the Act of March 4, 1915 (46 U. S. Code 673), was exclusive (Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 39, R., 170-172, 179; Assignments

of Errors Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 39, R., 199-201, 208).

(6) The denial of the right of the petitioner, an unpaid seaman discharged in a foreign country by reason of the violation by the respondent of U. S. Code, Title 46, Section 673, to a judgment or decree *in personam* against the respondent, the United States, for one month's pay and the cost of transportation back to the United States, as provided for in U. S. Code, Title 46, Section 685 (R. S. 4583), in addition to his discharge and wages earned under Section 2 of the Act of March 4, 1915, (46 U. S. Code 673), on the ground that the petitioner was not discharged by the United States Consul at London, Kingdom of Great Britain, and that said petitioner was a deserter (R., 220, 221).

(7) The finding of the United States Circuit Court of Appeals that the petitioner "deserted his ship" after the respondent, the United States, had violated U. S. Code, Title 46, Section 673, and the petitioner had become entitled to his discharge and wages earned, for the reason that he was not discharged by the United States Consul at London, Kingdom of Great Britain (R., 220, 221).

(8) Whether it was proper for the United States Circuit Court of Appeals to hold that the action of the District Court, in allowing a reargument of the case on the ground that the relief, provided for by U. S. Code, Title 46, Section 596, was a penalty and that the respondent, the United States, could not be held for a penalty, was correct, in view of the fact that the respondent, the United States, had not pleaded that the

relief, provided for by U. S. Code, Title 46, Section 596, was a penalty and that said respondent, the United States, had made no motion to amend its pleadings. (Assignment of Errors, 38, R., 207.)

(9) The finding of the United States Circuit Court of Appeals that the entry of the judgment or decree of August 15, 1932 was irregular, and that said decree was vacated and set aside by a granting of a rehearing after the entry of the said judgment or decree of August 15, 1932 (Assignments of Error Nos. 40, 41, 42, 43, R., 208-209).

B. Reasons Relied on for Allowance of Writ.

Because the Circuit Court of Appeals for the Second Circuit has:

(1) Rendered a decision in conflict with the Fifth Amendment to the Constitution of the United States, the opinions and decisions of this Court, the decisions of the United States Circuit Court of Appeals for the Ninth Circuit, and the United States District Court for the districts of Maryland, South Carolina, and Massachusetts, as well, as the courts of last resort in the State of New York and the State of Massachusetts, so that a review of this Court is necessary for uniformity of decision in the federal and state courts in respect to highly remedial federal statutes and constitutional questions.

(2) Decided important questions of general law in a way untenable and in conflict with the weight of authority.

(3) Decided important questions of federal law which have not been, but should be settled by this Court.

(4) Decided federal questions in a way that conflicts with the Fifth Amendment to the Constitution of the United States, applicable decisions of this Court, and the judicial history of U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746.

(5) So far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the United States District Court for the Southern District of New York, as to call for an exercise of this Court's power of supervision.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari, to review the decision of the United States Circuit Court of Appeals for the Second Circuit, should be granted.

John M. Scoble,

JOHN M. SCOBLE,
Proctor for Petitioner.

K. COURTENAY JOHNSTON,
of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

LIVINGSTON H. MCCREA,

Petitioner,

versus

UNITED STATES OF AMERICA, AS OWNER OF THE S. S. AMERICAN SHIPPER, ENGINES, TACKLE, APPARATUS, ETC.,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I. The Decisions of the Courts Below.

The decision of the United States Circuit Court of Appeals for the Second Circuit was rendered on April 29, 1934 (R., 216-221). It is reported in 70 Fed. (2) 632. On May 7, 1934 the decree of the United States Circuit Court of Appeals, affirming the decree of the District Court, was entered (R., 221).

The decree of the United States District Court for the Southern District of New York, dated August 12, 1932, and entered August 15, 1932, appears on pages 153 and 154 of the record.

The opinion of Judge Knox of the United States District Court, dated July 26, 1932, appears on pages 141-150 of the record, and is reported in 3 Fed. Sup. 184.

The decree of the United States District Court, dated March 8, 1933, and entered March 9, 1933, appears on pages 164 and 165 of the record.

The opinion of Judge Knox of the United States District Court, dated February 10, 1933, appears on pages 156-163 of the record, and is reported in 3 Fed. Sup. 184, 187.

II. Jurisdiction.

(1) The date of the decree to be reviewed is May 7, 1934, and will be found on page 221 of the record.

Grounds of This Court's Jurisdiction.

(2) This case involves important questions of maritime law, affecting seamen and shipping interests generally, which frequently arise before both federal and state tribunals, but have not heretofore been definitely decided by this Court, and which, for the information of the bench and bar of this country, should be determined, pursuant to U. S. Code, Title 28, Section 347(a), (R., 169-179, 198-209, 216-221).

(3) Construction of U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746, and the cognate provisions of the Seamen's Acts of June 7, 1872, March 4, 1915, and March 9, 1920.

(4) Construction of the Fifth Amendment to the Constitution of the United States, particularly that portion thereof which provides that no person shall "be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

III. Statement of the Case.

A. THE FACTS.

The S. S. *American Shipper* was owned by the United States (R., 16-17) and registered in the name of the United States Shipping Board (Respondent's Ex-B, p. 131), and was operated as a merchant vessel engaged in the common carriage of goods and passengers by sea for hire. This is admitted by the respondent (R., 4, 13-15; Respondent's Exhibit B, R., 131). This was also found by the decision of the United States Circuit Court of Appeals (R., 216). It was also found by the United States Circuit Court of Appeals that the S. S. *American Shipper* was subject to the provisions of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673) (R., 216).

On February 15, 1928, the libellant, petitioner herein, signed shipping articles for a voyage on the S. S. *American Shipper* from the Port of New York to the Port of London, Kingdom of Great Britain, and return, at wages of $65 per month (R., 7).

The S. S. *American Shipper* carried on said voyage a crew of ten able seamen, two ordinary seamen, and one additional person who was rated as an able seaman (R., 17-18, 62, 143). She also carried six firemen, three water tenders and eight oilers (R., 18).

On the voyage from the Port of New York to the Port of London the crew of the vessel S. S. *American Shipper* was not divided into equal watches as required by Section 2 of the Seamen's Act of March 4, 1915 (46

U. S. Code, Sec. 673). This appears even accepting the testimony offered by the respondent (R., 143).

On arrival at the Port of London the libellant, the petitioner herein, demanded his discharge from the vessel and the payment of his wages earned on the ground of the violation of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673). He also demanded one month's additional pay and transportation back to the United States under the provisions of R. S. 4583 (U. S. Code, Title 46, Sec. 685) (R., 55, 129-130). These demands were refused. At that time he was not entitled to and did not demand any double wages under the provisions of U. S. Code, Title 46, Section 596; R. S. 4529. At the request of the captain, the libellant, petitioner herein, went to the office of the American Consul next morning and made a full statement of the case to him. The Consul stated that even if Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673) had been violated, he did not think the libellant, petitioner herein, was so affected that he was entitled to his discharge, and he refused to discharge him (R., 107, 118, 119, 120). The libellant returned to the vessel and did his utmost to see the captain, but was unable to do so. He later left the vessel without having been paid any part of the wages due him, and was not even permitted to take his clothes. The vessel sailed for the Port of New York on March 2, 1928. The libellant, petitioner herein, was unable to secure money to pay his transportation back to the United States for three or four weeks. As soon as he could do so he returned to the United States (R., 23, 29-30).

B. THE PROCEEDINGS IN THE TRIAL COURT.

The action was begun by the libellant, the petitioner herein, on or about July 9, 1928. In his libel he demanded judgment for the wages due him on February 26, 1928, one month's additional wages, the amount of costs incurred in securing transportation back to the United States, the return of his clothes, and also two days pay for each of the days the wages due him were not paid from the time of demand until the time when the same were paid (R., 3-12).

The respondent (R., 13-15) admitted that the S. S. *American Shipper* was a merchant vessel and carried passengers and merchandise consigned to and shipped by private parties.

The action came on for trial before Judge Knox on May 6, 1932 (R., 16).

On or about July 26, 1932, Judge Knox handed down his decision (R., 141-150). He held that even according to the testimony submitted by the respondent, Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673) had been violated, and that the libellant, petitioner herein, was entitled to his discharge and the wages earned at that time (R., 143). He also held that:

> "* * * The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from a 'sufficient cause' ",

and that the libellant, the petitioner herein, was entitled to two days pay for one from the time of the commencement of the action to the date of the entry of the decree (R., 150).

The Trial Court also held that the libellant, the petitioner herein, was not entitled to one month's additional pay and the cost of transportation back to the United States, as provided for by R. S. 4583 (46 U. S. Code, Sec. 685), for the reason that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673) for the violation of said section, was exclusive (R., 144-146).

The decree was signed by Judge Knox on Friday, August 12, 1932, (R., 153) and was entered on Monday, August 15, 1932 (R., 154). On or about Saturday, August 13, 1932, after the decree had been signed, the proctor for the respondent wrote a letter to Judge Knox stating that his attention had been called to two cases which he believed held that the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), was a penalty, and that it could not be recovered against the United States, and he requested a rehearing of the case (R., 151-152).

There is absolutely no evidence to show when this letter reached Judge Knox, whether it was before or after the entry of the decree on Monday, August 15, 1932, or to show that the Clerk of the Court knew anything of it. It appears from the evidence that the decree must have been sent to the Clerk to be duly entered and that he did so. Nowhere does it appear that the court ever notified the clerk not to enter the decree. There is nothing in the record to show that the Court took any notice of the application for a rehearing until on or about August 28, 1932, when it granted a rehearing of the suit (R., 155).

On or about February 10, 1933, the Court handed down a decision holding that the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), was a penalty, and that said relief could not be recovered against the respondent (R., 156-163).

The District Court in its decision did not pass upon the question as to whether or not, even if the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), were a penalty, the respondent, the United States, had waived any immunity it might have been entitled to as a sovereign by entering into commercial business in competition with private owners, and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2 and 6, (U. S. Code, Title 46, Sections 741, 742, 746).

The decree was entered on or about March 9, 1933 (R., 164-165), and an order allowing an appeal from this decree was duly signed and filed March 16, 1933. On said date assignments of error were also duly filed (R., 169-179). On July 16, 1933, the United States Attorney moved for an order amending the decree filed March 9, 1933, by inserting a clause therein vacating and setting aside the decree entered August 15, 1932 (R., 181-187). The motion was opposed (R., 187-193), but was granted. An order amending the decree of March 9, 1933, by inserting a clause therein vacating the decree entered August 15, 1932, was entered on July 18, 1933 (R., 194-196).

On August 10, 1933, an appeal from the amended decree entered July 18, 1933 was allowed in the District Court, and new assignments of error were filed

by the libellant, the petitioner herein, which questioned, in addition to the issues previously raised, the power of the District Court to amend the decree of March 9, 1933, and to vacate the decree of August 15, 1932 by the amended decree of July 18, 1933 (R., 198-209).

C. THE PROCEEDINGS ON THE APPEAL.

The transcript of the record was duly certified by the Clerk of the United States District Court on October 13, 1933. The case was promptly docketed on or about October 13, 1933, (R., 215), without prepayment of costs, by virtue of the provisions of U. S. Code, Title 28, Section 837, under which petitioner now brings his application to this Court. A hearing was thereafter had in the United States Circuit Court of Appeals on February 14, 1934, and a decision was handed down on or about April 29, 1934 (R., 216-221). The decree of the United States Circuit Court of Appeals was entered May 7, 1934 (R., 221).

In its decision the Circuit Court of Appeals, although stating that in a number of cases, including the case of *Vincent v. United States*, 272 Fed. 889, which had been decided by the Circuit Court of Appeals for the Ninth Circuit, it had been held that the relief of two days pay for one, provided by R. S. 4529 (46 U. S. Code, Sec. 596), was not a penalty but was compensation or wages, held nevertheless that they would follow the decision in the case of *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554. That case construed a statute of the State of Arkansas and held that the relief provided for by the Arkansas statute was a penalty and that it could not be recovered

against the respondent, the United States, which was operating a railroad in the State of Arkansas under a war measure. The Circuit Court of Appeals in the case at bar accordingly held that the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), was a penalty and not compensation or wages, and that said relief could not be recovered against the respondent, the United States (R., 216-221).

The District Court held that the libellant, the petitioner herein, could not recover for the additional one month's pay and the cost of transportation back to the United States, although he had been discharged in a foreign country on account of the violation of Section 2 of the Act of March 4, 1915, Chapter 155 (46 U. S. Code, Sec. 673) by the respondent, the United States, for the reason that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673), was exclusive (R., 144-146). The Circuit Court of Appeals did not pass upon the question of whether or not the relief under Section 673 was exclusive, in any way whatsoever, but held that the libellant, petitioner herein, was not entitled to the relief provided by R. S. 4529, (46 U. S. Code, Sec. 685), and based its decision upon the fact that the libellant, petitioner herein, had not been discharged by the American Consul at London. Whether by inference it might be said that the Circuit Court of Appeals decision meant or implied that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673), is not exclusive, and that if the petitioner herein had been discharged by the American Consul he would have been entitled to the relief, provided for by R. S. 4583 (46 U. S. Code, Sec. 685), does not ap-

pear, and that question is left open by the decision of the Circuit Court of Appeals, and should be decided by this court.

The Circuit Court of Appeals also held that when the libellant, the petitioner herein, left his vessel in London, without being discharged by the American Consul, he "deserted his ship," (R., 220) although it had been held by the District Court that he was entitled to his discharge, to leave his ship, and to receive the wages earned (R., 143). It had also been held by the United States Supreme Court that under those conditions he was not a deserter and was entitled to his discharge and to receive the wages earned and could bring an action therefor. See *O'Hara v. Luckenbach Steamship Co.*, 269 U. S. 364.

IV. Specification of Errors.

The errors assigned and intended to be argued have been outlined above in the petition (pp. 1-6), to which reference is respectfully made.

V. Argument.

POINT I.

Petitioner's wages were withheld "Without Sufficient Cause".

It was found by the District Court, in its opinion dated July 26, 1932 (R., 142-150) (3 Fed. Sup. 184), that the crew of the S. S. *American Shipper* had not been divided into equal watches, as required by Section

2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673), and that the libellant, the petitioner herein, was entitled to his discharge from said vessel at the Port of London upon his demand, and also to the wages earned (R., 143). It was also found that:

> • • • "The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from 'a sufficient cause'." (R., 150.)

The District Court, in its opinion dated February 10, 1933 (R., 156-163), did not in any way change or modify this finding. The respondent took no appeal from this finding. In fact, it took no appeal whatsoever, and said finding was not questioned in the decision of the Circuit Court of Appeals (R., 216-221).

POINT II.

The relief, provided for under the Seamen's Act of March 4, 1915, Chapter 153, Section 3, R. S. 4529, (46 U. S. Code, Sec. 596), is compensation or wages and not a penalty.

The relief of two days' pay for one, provided for under R. S. 4529 (46 U. S. Code, Sec. 596), is compensation or wages and not a penalty.

All the statutes providing for the relief of a seaman become and are a part of the contract with him when he signs shipping articles. The decision of the District Court and that of the Circuit Court of Appeals that said relief was a penalty is in conflict with the Fifth Amendment to the Constitution of the United

States, with the statute itself, with the decisions of this Court, and with the decisions of the United States Circuit Court of Appeals for the Ninth Circuit, the United States District Court for the districts of Maryland and South Carolina, as well as the courts of last resort in New York and Massachusetts.

R. S. 4529, Act of March 4, 1915, Chapter 153, Section 3 (46 U. S. Code, Sec. 596) provides:

> "*Time for payment.* The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage."

The Circuit Court of Appeals in its decision admits that the relief, provided for in the statute in question (R. S. 4259; 46 U. S. Code, Section 596), has been held to be compensation or wages, and judgment granted

and entered, in an action against the United States (*Vincent v. United States*, 272 Fed. 889), and that in a number of other cases, where the question has been raised as to whether or not the relief is a penalty, it has been decided that it was compensation or wages and not a penalty (R., 219). No reported case had held such relief to be a penalty, except for dicta in a District Court case, *Corrigan v. United States*, 298 Fed. 610.

In the case of *Vincent v. United States*, 272 Fed. 889, judgment was allowed against the respondent, the United States (who is the respondent in this case), for the relief provided for in said statute, 46 U. S. Code, Section 596. The Vincent case was decided by the United States Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals in its opinion in the present case states that in the Vincent case the question of whether or not the relief, provided for under said statute, was compensation or wages, was not discussed. It must be presumed, however, that in considering the Vincent case the Court had in mind all questions of facts and law involved and considered the same.

United States v. Texas, 143 U. S. 621, 642.
Danks v. Gordon, 22 Fed. 821, 823.

Not only this, but in subsequent cases before the same Court, the United States Circuit Court of Appeals for the Ninth Circuit, it was held that the relief provided for in said statute did not constitute a penalty but was for compensation or wages earned.

Gerber v. Spencer, 278 Fed. 886.

In the case of *Buckley v. Oceanic Steamship Co.*, (5 Fed. (2) 545, C. C. A., 9th Circuit), the same court and two of the same judges, who had decided the Vincent case, the opinion of Hunt, J., being concurred in by Gilbert and Rudkin, JJ., said (p. 546):

> "• • • The nature of the statute (R. S. 4529), whether it is remedial or penal, has been considered *by this and other courts,* which have held that sums recoverable under its provisions are treated as wages—compensation to seamen, rather than the punishment of the master. *Gerber vs. Spencer,* (C. C. A.) 278 Fed. 886; *Cox v. Lykes Bros.,* 237 N. Y. 376, 143 N. E. 226" (Italics ours).

And also (p. 546):

> "In as much as the claim for the two days' pay under Sec. 4529, *supra,* is for extra wages as incidental to the wages proper, it stands upon no different basis than does the claim for wages proper."

It has also been held in a number of other cases that said relief provides for compensation or wages and not a penalty.

The Fort Gaines, 18 Fed. (2) 413;
The Chester, 25 Fed. (2) 908;
The Trader, 17 Fed. (2) 623.

This Court said, in the case of *Collie et al. v. Fergussen, et al.,* 281 U. S. 52 (p. 54):

> "The claim for double wages which, when valid, is by the terms of the statute '*recoverable as wages,*' has been held to be embraced in the seaman's lien for wages with priority over other liens, and governed by the procedure applicable to suits for the recovery of seamen's wages • • •" Citing cases. (Italics ours.)

The same question came before the Circuit Court of Appeals of the State of New York in the case of *Cox*

v. Lykes Bros., Defendant, and *United States Shipping Board Emergency Fleet Corp.*, Defendant-Respondent, 237 N. Y. 376.

The complaint against the defendant Lykes Brothers had been dismissed (204 A. D. 442), and the defendant *United States Shipping Board Emergency Fleet Corporation was the sole respondent* in the Court of Appeals. The opinion therein was written by Mr. Justice Cardoza, now of this Court. As was stated in said opinion, the vessel in question was registered in the name of the United States of America and was operated by the United States Shipping Board Emergency Fleet Corporation through Lykes Brothers as agents. The question raised on this appeal was whether or not R. S. 4529 (46 U. S. Code, Sec. 596) provided for compensation or wages, or for a penalty, and whether an action therefor could be brought in a state court. The Court held that it provided for wages or compensation and did not provide for a penalty. On page 379 the Court said:

> "The Appellate Division found the present suit to be one for a penalty or forfeiture within the meaning of this statute. We do not so regard it. Congress has expressly said that the extra compensation, when due, 'shall be recoverable as wages.' This would seem decisive, without more, that in determining the bounds of jurisdiction, it is not to be classified as a penalty. There was no thought that the state courts, which have undoubted jurisdiction to give judgment for wages in the strict sense, should be shorn of jurisdiction to give judgment for the statutory incidents. This conclusion is fortified when we search for the purpose of the statute. The purpose, or at least the predominant one, was not punishment of the master or owner, but compensation to the seaman. Delay means loss of opportunity to ship upon an-

other vessel. It means hardship during the term of waiting, the sufferer, often improvident, and stranded far from home. 'In all fairness he should recover more than the amount due him for wages earned' *(Calvin v. Huntley,* 178 Mass. 29, 32). How much this extra amount should be would be often a troublesome question, if it were left open in every case. '*Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which, therefore, should be taken to the law of the contract'* (Calvin v. Huntley, *supra; Gerber v. Spencer,* 278 Fed. Rep. 887; *Covert v. British Brig Wexford,* 3 Fed. Rep. 577, 578, 579). The case cited from Massachusetts is authority for the ruling that an action for extra wages under section 4527 of the United States Revised Statutes, which does not differ in essentials from section 4529, may be maintained in the state courts, and is not an action for a penalty * * *'' (Italics ours).

The same construction of a similar statute, R. S. 4527 (46 U. S. Code, Sec. 594), was given in the case of *Calvin v. Huntley,* 178 Mass. 29, 32, in which decision Mr. Justice Holmes, later a member of this Court, concurred.

An action for extra wages, under R. S. 4527 (46 U. S. Code, Sec. 594), does not differ in essentials from R. S. 4529 (46 U. S. Code, Sec. 596), *(Cox v. Lykes Bros.,* 237 N. Y. 376, 379).

In the case of *United States Steel Products Co. v. Adams, (The Steel Trader),* 275 U. S. 388, which was brought under R. S. 4527, it was said (p. 391):

> "The word compensation, in Sec. 4527, distinctly indicates that payment of a sum equal to one

month's wages was intended to constitute the remedy for invasion of the seaman's rights through breach of his contract of employment in the circumstances specified. 'Damages consist in compensation for loss sustained * * * By the general system of our law, for every invasion of right there is a remedy, and *that remedy is compensation.* This compensation is furnished in the damages which are awarded.' Sedgwick's Damages, 9th Edition, Vol. I, p. 24. See also *Bauman v. Ross,* 167 U. S. 548. The provision that such sum may be recovered 'as if it were wages duly earned' permits the seaman to enforce payment by the special and summary methods provided for collecting his ordinary wages.

"In *Calvin v. Huntley,* (1901) 178 Mass. 29, 32, we think the Supreme Court of Massachusetts properly interpreted Sec. 4527, and in respect of it rightly said:

" 'It speaks not of punishment but of compensation, its object is to protect the seamen from loss rather than to punish the master for discharging him. *The remedy is given to the seamen alone, and its plain purpose is to furnish a clear and well defined rule of damages as between him and the master for a breach of contract in which the seaman and the master or owner are the only persons interested* * * * Nor does the rule of damages seem unreasonable. The shipping contract calls upon the seaman to go to various places, sometimes far from home, and it may be, for instance as in this case was the actual fact, that he may be discharged in a port distant from that where he signed the articles, or where he can not immediately secure any other employment on board ship or elsewhere, and that in all fairness he should recover more than the amount due him for wages earned. Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which therefore should be taken to be the law of the contract. *The object of the stat-*

> *ute is not to punish but to provide a reasonable rule of compensation for a breach of contract.* We think the statute not penal but remedial * * *'" (Italics ours).

In practically all cases, where the question of the construction of R. S. 4529 (46 U. S. Code, Sec. 596) or R. S. 4527 (46 U. S. Code, Sec. 594), has come in question in actions pending in the federal courts and courts of various states, it has been held that the relief provided for in said sections constituted compensation or wages and not a penalty and was part of the contract.

In all cases where the relief under these statutes has been refused it has been on the ground that the failure or refusal to pay the wages due was with "sufficient cause."

The Circuit Court of Appeals in its opinion (R., 219) admits that in the cases in which the question has been raised of whether or not the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), is a penalty, or wages or compensation, it has been held that it is wages or compensation and not a penalty.

The Circuit Court of Appeals bases its opinion that the relief, provided for by said statute, is a penalty and not wages or compensation, on the case of *Missouri Pacific R. R. Co. v. Ault,* 256 U. S. 554. That case involved the construction of a statute of the State of Arkansas, which stated specifically that the relief was a penalty, and also involved what is known as the Federal Control Act.

In the Ault case *(supra),* the President had taken possession of the Missouri Pacific Railroad pursuant

to the Proclamation of December 26, 1917 (40 Stat. 1733), under the Act of August 29, 1916 (C. 418, 39 Stat. 619, 645). In the last named statute (39 Stat. 645), it was provided:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and *to utilize* the same, *to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment,* or for such other purposes connected with the emergency as may be needful or desirable." (Italics ours.)

In said case the Court said (p. 559):

> "The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President *for war purposes* was not to be disturbed." (Italics ours.)

The railroad was being operated as a *war measure* under the Federal Control Act (39 Stat. 645) *for the transportation and transfer of troops, war material and such other purposes as might be connected with the emergency as might be useful and desirable, to the exclusion of other traffic.* As is said in the Ault case (p. 559):

> "* * * but the property in the hands of the President *for war purposes* was not to be disturbed." (Italics ours.)

In the present case, *McCrea v. United States,* the government was operating the merchant vessel, S. S. *American Shipper* in competition with private owners, and under the provisions of the Suits in Admiralty Act.

Judge Cardoza clearly distinguished the statute involved in the Ault case, and R. S. 4529 (46 U. S. Code, Sec. 596), in his opinion in *Cox v. Lykes Bros. et al.*, 237 N. Y. 376, saying (p. 380):

> "We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer * * * The nature of the problem will determine whether we are to take one viewpoint or the other. *From the viewpoint of the government (in the Ault case) the court found this provision predominantly penal as well it might, not only because the statute (of Arkansas) so declared, but also because of the differing situation of seamen on the one hand and railroad workers on the other. Here (referring to the Cox v. Lykes case), Congress imposing a liability for the benefit of seamen, has put it on the same plane as a liability for wages, and has said that the two shall be enforcible together.*" (Italics and words in parentheses ours.)

Vincent v. United States, 272 Fed. 889.

Gerber v. Spencer et al., 278 Fed. 886.

Buckley v. Oceanic Steamship Co., 5 Fed. (2) 545.

The distinction between the situation where the United States is engaged in private business (as in the McCrea case, and in the cases just cited), and that where it is engaged in a governmental capacity as a war measure (as in *Missouri Pacific R. R. Co. v. Ault, supra)*, is set out in the case of *Ballaine v. Alaska Northern Ry. Co.*, (259 Fed. 183, at p. 185):

> "The act of March 12, 1914, ch. 37, heretofore cited, which authorizes the President to locate, construct and operate railroads in Alaska, expressly provides that the Alaska Railroad is *for the settlement of public lands and the transportation of coal for the Army and Navy, for the transportation of troops, arms, munitions of war, the mails,*

> *and for other governmental and public uses,* and to transport passengers and property. The act (Section 21) also confers authority upon the President, through such agents as he may appoint or employ, to do all necessary acts, in addition to those specially authorized, to enable him to accomplish the purposes of the Act * * * Taking all these provisions together they plainly show, that the United States * * * acted in its sovereign capacity, and in exercising entire control, possession, ownership and management, has merely employed the corporate organization as an agency through which to exercise the purposes of the statute." (Italics ours.)

Referring to the case of *Salas v. United States,* (234 Fed. 832), which was similar to the case at bar, the court said (p. 185):

> "The Court of Appeals (in the Salas case) was of the opinion that the United States had entered into commercial business in the premises and was to be treated like any other corporation * * *"

In the case of *Salas v. United States,* 234 Fed. 842, C. C. A., 2d Circuit, Salas was charged with conspiracy to defraud the United States. The Panama Railroad Co. was a New York corporation, and was an agency of the United States, all the stock being held by the United States, and was operated by the War Department. It is said (p 844):

> "When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation. *Bank of United States v. Planters Bank,* 9 Wheat. 904, 6 L. Ed. 244. Although it absolutely owns the Panama Railroad Company and is the only person profiting or losing by its activities, still the Railroad Company sues and is sued just like any other corporation, in its own name."

POINT III.

The respondent, the United States, waived any immunity to which it was entitled by entering into commercial business in competition with private owners and by the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2, 6, (46 U. S. Code, Secs. 741, 742, 746).

One of the peculiar things in this action is that both the District Court and the Circuit Court of Appeals, in their decisions, neglected or failed to consider the vital point that, even if the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), *were a penalty, and not wages or compensation, the respondent, the United States, divested itself of all sovereign character and waived immunity, both by entering into commercial business in competition with private owners, and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95,* Secs. 1, 2 & 6, (46 U. S. Code, Secs. 741, 742, 746).

Even before the Suits in Admiralty Act was passed it had been held by this Court, in the case of *The Lake Monroe,* 250 U. S. 246, that the vessel, *The Lake Monroe,* was subject to libel even though it was claimed that said vessel was exempt from seizure on the ground that it was the property of the United States. In said action the libellant claimed that the vessel was not exempt from seizure under Section 9 of the Shipping Board Act of September 7, 1916, which read in part (46 U. S. Code, Sec. 808):

> Section 808 * * * Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing mer-

chant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage lien, or other interest therein.

The court so held, saying (pp. 254, 255, 256):

"The provisions of Section 9 of the Act of Sept. 7, 1916, that vessels purchased, chartered or leased from the Shipping Board, while employed solely as merchant vessels, should be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States were interested therein as owner or otherwise, was a most material restriction, deemed by Congress to be essential to subject them to the same duties and liabilities as privately owned merchant vessels with which they competed * * *"

"Her service at the time was purely commercial, and she was subject by the terms of the act to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the Government in the outcome of her voyage * * * We deem it clear, also, that among the liabilities designated by the section is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision."

In order to avoid the inconvenience and delay of the seizure of vessels owned by the United States, or in which it had an interest, the Suits in Admiralty Act of March 9, 1920, was passed. In this act, all liabilities of private owners were assumed by the United States, but the vessels owned by it or its corporations were exempt from libel.

Eastern Transportation Co. v. United States, 272 U. S. 675.

That it was the intent of Congress that the United States should waive all immunity, and should stand in the same position as the owners of privately owned vessels, clearly appears.

In or about the year 1932, an amendment to Section 5 of the Seamen's Act was before Congress. The amendment was for the purpose of allowing actions to be continued against the United States or the United States Shipping Board Merchant Fleet Corporation, formerly known as the United States Shipping Board Emergency Fleet Corporation. On or about June 6, 1932, the Senate Committee on the Judiciary submitted its report, Calendar No. 821, Report No. 771, 72nd Congress, which contains the following statements:

"TO AMEND SECTION 5 OF THE SUITS IN ADMIRALTY ACT"

"Mr. Austin, from the Committee on the Judiciary, submitted the following

"REPORT

"(To accompany H. R. 7238)

"* * * When the United States Government began to engage in the operation of merchant vessels, it sought in every way possible to compete for freights with the merchant vessels of private carriers of similar freight, most of which were of foreign nationality. In its competitive efforts to get business, it found itself handicapped because, as a sovereign Government, it could not be sued except by special act of Congress in each case, whereas a private carrier was readily amenable to the process of the courts in the event of death or injury to seamen or of any damage caused by the vessel or its operators to the cargoes or passengers on board. This led to the use of vessels of private carriers in preference to those of the Government.

"In order to remove that competitive handicap, the United States Shipping Board Emergency Fleet Corporation requested Congress to permit seamen, cargo shippers, and passengers on Fleet Corporation vessels to sue the United States in the same manner as if the seamen were employed by, or the cargo were shipped, and the passenger sailed on a privately owned vessel * * *"

In the report, No. ~~1912~~ 1012, 72nd Congress, 1st Session, submitted by the Committee on the Judiciary of the House of Representatives the intent of the Suits in Admiralty Act also clearly appears, as follows:

"AMEND THE SUITS IN ADMIRALTY ACT"

"Mr. Montague, from the Committee on the Judiciary, submitted the following

"REPORT

"(To accompany H. R. 7238)

"The Committee on the Judiciary, to whom was referred the bill H. R. 7238, after consideration, reports the same favorably with an amendment and recommends that the bill as amended do pass.

"The committee amendment is as follows:

"The chief purposes which Congress sought to accomplish by the passage of the admiralty act were:

"1. To free the United States Government from the embarrassment and necessity of putting up bonds in those cases where United States merchant vessels were seized and suits commenced *in rem*.

"2. To enable the merchant vessels of the United States Fleet Corporation to compete for freights on an equal footing with other American and foreign merchant ships.

"*This was done by abandoning the immunity which the United States enjoyed from suits in personam against the Fleet Corporation for such acts as a private carrier could be sued for in the courts of this country.*

"In this connection, Congress first legislated on the subject in the shipping act of 1916 (39 Stat. 728, c. 451) of which section 9 provides:

"Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien or other interest therein." (Italics ours.)

The Suits in Admiralty Act (March 9, 1920, c. 95, Secs. 1, 2, 6; 41 Stat. 525, 526, 527; 46 U. S. Code, Secs. 741, 742, 746) provides as follows:

> Section 741. Exemption of United States vessels and cargoes from arrest or seizure.—No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this chapter shall not apply to the Panama Railroad Company.
>
> Section 742. Libel *in personam*. In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation * * *
>
> Section 746. Exemptions and limitations of liability. The United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

In the *Matter of Snug Harbor*, 283 Fed. 1015, where the question of the Suits in Admiralty Act was raised, it is said (p. 1018):

> "* * * So it would seem that Congress, in the passage of the Act of March 9, 1920, intended to waive its claim of immunity, and place itself upon a parity with other ship owners engaged in similar trade and traffic; *to take upon itself the same obligation*

that by law it imposes upon others in like business * * * *Not only therefore does the express language of the act, but equally the failure to limit its terms, lead to the conclusion of an abandonment of immunity,* under the circumstances obtaining in the instant case." (Italics ours.)

In the same case, under the title of *Eastern Transportation Co. v. United States,* 272 U. S. 675, this Court said (pp. 687, 688):

"It is first objected to the recovery here that it was not intended by the Suits in Admiralty Act to subject the United States itself to prosecution for a *crime* which it denounces in its legislation. We need not be troubled by this objection, because there is no attempt here to prosecute the United States or any of its agents criminally. The declaration that the leaving of a wreck in a navigable channel in a place dangerous to passing steamers without notice of the danger and without immediate removal is unlawful, makes such omission a maritime tort, which, if merchant vessels of the United States are to respond in tort, may be recovered for in its admiralty courts against the United States without anomaly. *The Fahy,* 153 Fed. 866; *The Macy,* 170 Fed. 930; *People's Coal Company,* 181 Fed. 609, 188 Fed. 892. Under the Tucker Act and the general jurisdiction of the Court of Claims, of course, the United States is made liable only upon a contract express or implied, and not for a tort; *but its liability provided for in the Suits in Admiralty Act can not be limited to contracts any more than the liability of its merchant vessels under the Shipping Act of 1916 could be so limited. The Lake Monroe,* 250 U. S. 246." (Italics ours.)

Eastern Transportation Co. v. United States, 29 Fed. (2) 588; *United Fruit Co. v. United States Shipping Board Merchant Fleet Corp.,* 42 Fed. (2) 222; *Grace v. United States Shipping Board,* 53 Fed. (2) 272.

The Act of March 9, 1920, Chapter 93, Section 6 (46 U. S. Code, Sec. 746) provides:

> "The United States or such corporations shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels."

The United States, having taken away the right of the libellant, the petitioner herein, to libel the vessel, the S. S. *American Shipper,* and having accepted all the provisions of the Suits in Admiralty Act and all the exemptions and limitations of liability provided thereunder, must also assume all liabilities that would be assumed by or imposed upon private owners.

Eastern Transportation Co. v. United States, 272 U. S. 675, 690.

In the cases of *Lynch v. United States and Wilner v. United States,* recently decided by this Court, June 4, 1934, (78 U. S. Sup. Ct. Law Edition, p. 997), suit was brought on what may be referred to as two war insurance policies. It was contended on behalf of the respondent, the United States, that Section 17 of the Economy Act repealed "all laws granting or pertaining to yearly renewal term insurance." This Court held that the United States itself could not abrogate outstanding rights. On page 1001 it is said:

> "The Fifth Amendment demands that property be not taken without just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States v. Central Pacific R. R. Co.,* 118 U. S. 235, 238; *United States v. Northern Pacific R. R. Co.,* 256 U. S. 51, 64, 67.

> When the United States enters into contract relations its rights and duties therein are governed generally by the laws applicable to contracts between private individuals."

The United States was clearly in business in competition with private concerns and was bound by its contract with the libellant McCrea, and had lost any immunity it might have had as a sovereign. Any other construction would constitute an unfair discrimination against seamen employed on merchant vessels owned by the United States and would result in taking their property without just compensation, which is prohibited by the due process clause of the Fifth Amendment to the Constitution of the United States.

In the case of *Ohio v. Helvering*, decided May 28, 1934, (78 U. S. Sup. Ct. Law Edition, p. 911), the Court said (p. 912):

> "Whenever a state engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vested in Congress.
>
> "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support on some authority apart from the police power.
>
> "When a state enters the market place seeking customers it diverts itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the government is concerned."

In *Georgia v. Chattanooga*, 264 U. S. 472, the City of Chattanooga sought to condemn lands owned by the State of Georgia. The lands were used by Georgia for railway purposes. Georgia sought to enjoin the condemnation proceedings. On page 481 it is said:

> "The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity. *Bank of United States v. Planters Bank*, 9 Wheat. 904, 907; *Bank of Kentucky v. Wister*, 1 Pet., 318, 323; *Louisville, C. and C. R. R. v. Letson*, 2 How. 497, 550; *South Carolina v. United States*, 199 U. S. 437, 463."

On page 482 it is said:

> "Having divested itself, (the State of Georgia), of its sovereign character, and having taken on the character of those engaged in the railroad business in Tennessee *(Bank of U. S. v. Planters Bank, supra)*, its property there is as liable to condemnation as that of others, and it has, and is limited to the same remedies as are other owners of property in Tennessee."

The United States had been engaged in private business operating vessels on the high seas as merchant vessels in competition with private owners. All merchant vessels were subject to libel, and it has been held by this Court that vessels owned by the United States, whether registered in its name or by some board or corporation in its behalf, were subject to libel the same as that of any other operator or shipowner.

The Lake Monroe, 250 U. S. 246.

Desiring to do away with the inconvenience of having merchant vessels owned by it subject to libel, the Suits in Admiralty Act was passed in which the United States agreed and contracted that the vessels should not be libelled but that in place thereof suit could be brought against the United States with the same force and effect as though the against a private owner. These provisions were embraced in the contract with the seamen and the rights thereunder could not be abrogated by the United States itself.

Lynch v. United States, 78 U. S. Sup. Ct., Law Ed. 997.

Yet, in the present case, *McCrea v. United States,* the Circuit Court of Appeals tries to do something which Congress could not do. That is, abrogate the rights McCrea had under his contract with the United States, including those rights arising from the Suits in Admiralty Act. It will be noted that in the opinions of the District Court and the Circuit Court of Appeals nothing is said about the Suits in Admiralty Act.

POINT IV.

The libellant, petitioner herein, upon his discharge at the foreign port of London by reason of the violation by the respondent, the United States, of U. S. Code, Title 46, Section 673, (Section 2 of the Seamen's Act of March 4, 1915), was entitled not only to his wages earned but also to one month's additional pay and to transportation back to the United States, under the provisions of R. S. 4583 (46 U. S. Code 685).

R. S. 4583 (Dec. 21, 1898, c. 28, sec. 18; 30 Stat. 760; 46 U. S. Code, Sec. 685) provides:

> "Section 685. Wages on justifiable complaint of seaman.—Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he was originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman."

The District Court found that the libellant, petitioner herein, was not entitled to the relief provided for by R. S. 4583 (46 U. S. Code, Sec. 685) when he was discharged at the port of London by reason of the violation by the respondent, the United States, of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673), for the reason that the relief, provided for by said Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673), was exclusive (R., 144-146).

The Circuit Court of Appeals in its decision, however (R., 220-221), did not pass upon the question as to whether or not the relief, provided for by Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673), was exclusive, but based its decision entirely upon the point that the libellant, petitioner herein, had not been discharged by the United States Consul.

While it might be inferred from the decision of the Circuit Court of Appeals that if the libellant, petitioner herein, had been discharged by the United States Consul at London, he would have been entitled to the relief provided for by R. S. 4583 (46 U. S. Code, Sec. 685), there is no positive decision to that effect, and the decision of the District Court that the relief, provided for by Section 2 of the Seamen's Act of March 4, 1915 (46 U.S. Code, Sec. 673), is exclusive, has not been overruled by the Circuit Court of Appeals decision, and that question should be passed upon by this honorable court.

The code of laws of the United States, Title 46, Sections 541 to 752 contains the disciplinary laws and the laws for the protection of seamen. Under their definition, no one comes under this law until he has entered into an agreement by which he becomes a seaman. Having entered into such an agreement, all the laws dealing with seamen in their relation to the ship and the country become applicable.

A seaman discharged in a foreign port might be stranded far from home, as in this case without even his clothes, in midwinter, and all the admiralty statutes are for his protection.

As is said in the case of *Howick Hall,* (10 Fed. (2) 162, at page 163):

> "Sailors are wards of the admiralty, and the courts jealously protect their rights."
>
> *The Steel Trader,* 10 Fed. (2) 248, 249.

All the statutes in relation to seamen are embraced in and become a part of the contract between the seamen and the shipowners.

In *United States Steel Products Co. v. Adams, (The Steel Trader)* (275 U. S. 388), the court, citing *Calvin v. Huntley,* (178 Mass. 29, 32), said (p. 392):

> "The remedy is given to the seamen alone, and its plain purpose is to furnish a clear and well defined rule of damages as between him and the master *for a breach of contract* in which the seamen and the master and owner are the only persons interested * * *"
>
> "The object of the statute is not to punish but to provide a reasonable *rule of compensation for a breach of contract.*" (Italics ours.)

The British Brig Wexford, 3 Fed. 577, 579.

Cox v. Lykes Bros., 237 N. Y. 376, 378.

The Steel Trader, 10 Fed. (2) 248, 252.

Calvin v. Huntley, 178 Mass. 29, 32.

There is no question but that when the respondent, the United States, violated Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673), the voyage was continued contrary to agreement, and the vessel rendered unseaworthy.

O'Hara v. Luckenbach S.S. Co., 269 U. S. 364, 367, 368.

In Re Meyer, 74 Fed. 881, 885.

In Re Pacific Mail S.S. Co., 130 Fed. 76.

Flint and P. M. R. v. Marine Insurance Co., 71 Fed. 210.

The Rolph, 293 Fed. 269.

Northern Com. Co. v. Lindblom, 162 Fed. 250, 254.

The S. S. *American Shipper* being unseaworthy, the libellant was not only entitled to his discharge and the wages due, but, having been discharged in a for-

eign port, he was also entitled to one month's additional pay and transportation back to the port of New York.

The Donna Lane, 299 Fed. 977.

It will be noted that Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673) does not state that the relief therein provided for is the sole relief.

In the case of the Snug Harbor, 283 Fed. 1015, the court said (p. 1018):

> "* * * but equally *the failure to limit its terms,* leads us to the conclusion of an abandonment of immunity."

The relief provided by Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673), not being limited by its terms, it clearly appears that the libellant was entitled to the benefit of all statutes enacted for his protection, including R. S. 4583 (46 U. S. Code, Sec. 685).

Section 2 of the Act of March 4, 1915 (46 U. S. Code, Sec. 673) applies to a case where a seaman might be discharged either in the United States or in a foreign country. In the ports of the United States he is in his home country. If discharged in foreign ports, a seaman, often improvident, is stranded far from home, and the relief provided by R. S. 4583, (46 U. S. Code 685) is for his protection.

The Circuit Court of Appeals bases its decision that the libellant, petitioner herein, is not entitled to the relief, provided for by R. S. 4583 (46 U. S. Code, Sec. 685), on the ground that said petitioner was not dis-

charged by the United States Consul at London and that he

> "* * * deserted his ship when he failed to get favorable action from the consul in London * * *" (R., 220).

It was found by the District Court that the libellant, petitioner herein, was discharged by reason of the violation by the respondent, the United States, of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673), and he was entitled to his wages earned. He did not desert his ship and he was entitled to bring this action.

Strathearn S. S. Co. v. Dillon, 256 Fed. 631; 252 U. S. 348.
Thompson, etc. v. Lucas, et al., 252 U. S. 358.
O'Hara v. Luckenbach S. S. Co., 269 U. S. 364.

The libellant, petitioner herein, made diligent efforts to have the United States Consul at London approve his discharge. Although the attention of the consul was called particularly to the decision of this court in the O'Hara case, *supra*, he refused to approve the discharge of the petitioner. This appears from the testimony of the respondent's own witnesses (R., 99-107, 115-118, 120).

In his deposition, offered in evidence by the respondent, the consul admitted that the libellant, petitioner herein, mentioned the case of *O'Hara v. Luckenbach S. S. Co., supra*, but stated that he, the consul, was not concerned with the decision of the United States Supreme Court in said case (R., 107, 118, 119, 124, 125). Yet the Circuit Court of Appeals in the case at bar has held in effect that the arbitrary act of

the consul, in refusing to discharge or to approve the discharge of the libellant, petitioner herein, deprived the libellant, petitioner herein, of all right to bring any action or proceeding in the courts of the United States to secure the relief provided for by R. S. 4583 (U. S. Code, Sec. 685). In other words, that the opinion of the United States Consul was superior to the opinion of the United States Supreme Court. If the decision of the Circuit Court of Appeals in this case (*McCrea v. United States*) should stand, it would mean that any law of the United States and any decision of the United States Supreme Court could be absolutely nullified by any consular officer of no matter how little minor importance. This would often mean, as in the instant case, that a seaman would be deprived of property without due process of law and without compensation.

U. S. Code, Title 46, Section 641, provides that a seaman, engaged on a voyage from any port of the United States to a foreign port ~~and~~ who is discharged in the United States, must be discharged in the presence of a duly authorized shipping commissioner. This court, however, has held that if U. S. Code, Title 46, Section 673, is violated, a seaman is not a deserter if he leaves his ship without the consent of, or any other act on the part of, the captain or shipping officer, and can bring an action in the United States Courts to recover the wages due.

O'Hara v. Luckenbach S. S. Co., 269 U. S. 364.
Strathearn S. S. Co. v. Dillon, 256 Fed. 631; 252 U. S. 348.
Thompson v. Lucas, 252 U. S. 358.

If it were necessary to secure the approval of the United States Consul to the discharge of the libellant, such approval was necessary solely for the protection of the captain, and it was his duty to secure it. See Section 4576 of Revised Statutes, as amended by Section 3 of the Act of March 3, 1897.

There was no question for the consul to decide. He admits that he was satisfied that the law had been violated (R., 124-125). The only question he might have passed upon was whether or not he should approve the discharge of the libellant for the protection of the captain. This he did not do. Even where a question of fact is submitted to a consul, his holding is not conclusive, but in this case there is no question of fact. The consul admits that he knew there was no question of the fact, and that he also knew of the decisions of the United States Supreme Court, which had clearly decided the law (R., 124-125). This being so, the libellant, petitioner herein, clearly should be allowed to present his claim in court for the relief provided for by R. S. 4583 (U. S. Code, Title 46, Sec. 685).

The Donna Lane, 299 Fed. 977, 982.

In *McAvey v. U. S. Emergency Fleet Corp.*, 15 Fed. (2) 405, the court said (p. 407):

> "These are questions (reasons for discharge of seamen) for the master to decide; he is the one who makes the discharge. The consul does not 'cause' a seaman to be discharged, as the declaration alleges, in a case like the present. It is evidently based upon a misunderstanding of the law. When a *master* discharges a seaman in a foreign port, in order to protect himself under Revised Statutes, Section 4576, *supra*, he must secure the consent of the consul to his action" (Italics and matter in parenthesis ours).

The decision of the District Court and the decision of the Circuit Court of Appeals in relation to the sections of the Seamen's Act involved in this case except Section 673 are clearly at variance, not only with each other, but with the decisions of this and other courts, and this question should be settled by this court.

The libellant, petitioner herein, submits that, by the decision complained of, the lower court has in fact authorized an interpretation and construction of U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746 contrary to the clear and unambiguous language in which the statutes were drafted by Congress, and the court reached its decision only by failing and refusing to give the language of these sections their clear meaning.

POINT V.

The judgment or decree, signed August 12, 1932, and entered August 15, 1932, was never vacated or set aside, and the court erred in entering the decree dated March 9, 1933.

The Court of Appeals in its opinion (R., 218) devotes considerable space to a discussion of the decree signed August 12, 1932 and entered August 15, 1932, and the decree signed March 8, 1933 and entered March 9, 1933. Although these questions do not go to the merits of the construction of the sections of the Seamen's Act, particularly U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746, and the constitutional points involved, the Court of Appeals deemed them important (R., 217-219).

The first judgment or decree in this action was signed by the District Court on *Friday,* August 12, 1932, after a hearing in relation to its form, at which time both sides were represented and the form of the decree agreed upon (R., 153). *Saturday,* August 13, 1932, was a half holiday. The judgment or decree was entered *Monday,* August 15, 1932. The letter of the proctor for the respondent, requesting a rehearing in this case, is dated August 13, 1932. This was *Saturday.* A copy was sent to the proctor for the libellant but it was not received by him until *Monday,* August 15, 1932.

> The Circuit Court of Appeals stated (R., 218): "* * * * It is apparent that the entry of the decree of August 15th two days after the request for rehearing was made was irregular. At that time the matter of a rehearing was pending and a rehearing without restriction was granted August 30th * * * *"

There is absolutely nothing in the record to uphold this conclusion. While it is true the letter on behalf of the respondent was dated August 13, 1932, which was a Saturday, there is nothing to show that it was sent to or received by the court on or before Monday, August 15th, or in fact, on or before August 30th (R., 155).

No motion was made to vacate or modify the decree of August 15, 1932. In the opinion of the District Court, modifying the decree of August 15, 1932, the court said (R., 156):

> "By memorandum opinion, dated August 30, 1932, a reargument of this case was granted * * * The decision previously rendered is modified * * *"

A decision is not a decree. *G. Amsinck v. Springfield Grocery Co.,* 7 Fed. (2) 855, 858, 859.

The case of *Hook v. Mercantile Trust Co. of N. Y.* 95 Fed. 41, cited by the Circuit Court of Appeals, is one where a decision had been handed down by the Court of Appeals, but it does not appear that any judgment had been entered thereunder. A motion was made by both sides for a rehearing and the motion was granted, and upon the rehearing the decision was modified.

POINT VI.

The respondent, the United States, did not plead that the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), was a penalty, and made no motion to amend its pleadings.

On the hearing before the District Court on the motion for a reargument of the case, a point was raised by the libellant, petitioner herein, that the respondent, the United States, had not pleaded that the relief, provided for by R. S. 4529 (46 U. S. Code, Sec. 596), was a penalty. Notwithstanding this, the respondent made no motion to amend its pleadings. If the contention of the respondent was correct, and the relief provided for by R. S. 4529 (46 U. S. Code, Sec. 596) was a penalty, the proctor for the respondent knew, or claimed he knew, or he should have known it at the time of the argument on the rehearing, but he did not make any motion to amend his pleadings. The respondent admitted that jurisdiction had been obtained, and it was found by the Circuit Court of Appeals that the vessel in question, the S. S. *American Shipper*, "was owned by the United States and was a merchant vessel subject to the provisions of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. Code, Sec. 673)." (R., 216.)

The respondent, not having raised in its pleadings the question that the relief provided for by R. S. 4529

(46 U. S. Code, Sec. 596) was a penalty, and having made no motion to amend its pleadings, it should not have been allowed to raise that question. This point was presented to the Circuit Court of Appeals, but they did not pass upon it in any way.

In the case of *Avery v. United States,* 12 Wall. 304, the court said (p. 306):

> "It is a familiar principle that no one can be relieved against a judgment, however unjust he may consider it, if he had a defense and, through his own fault, failed to present it * * * * It would lead to endless embarrassments in the administration of justice, if a party were permitted to reopen a judgment on the ground that he had a defense that he did not present, because ignorant of it, but which, the court can see, he could have known if he had used reasonable diligence to ascertain it."

It is of the utmost importance, not only to this case but for the information of the bench and bar of this country, that this question of pleading be decided by this court.

Conclusion.

The situation found to exist in the present case aptly demonstrates the soundness of the rule laid down in Elman v. Moller (11 Fed. 2d 55), where Rose, C. J., said:

> "The Courts should act promptly and vigorously to vindicate all the rights of seamen as well those recently conferred on them as those which date from time immemorial."

It is respectfully submitted that the petition for a writ of *certiorari* should be granted.

JOHN M. SCOBLE,
Proctor for Petitioner.

K. COURTENAY JOHNSTON,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 249.

LIVINGSTON H. McCREA,

Petitioner.

AGAINST

UNITED STATES OF AMERICA, as owner of the S. S. AMERICAN SHIPPER, engines, tackle, apparatus, etc.,

Respondent.

BRIEF OF PETITIONER.

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U. S. Code, Title 46, Sec. 746 ..... 2, 6, 8, 10, 32, 33, 34, 35, 60
U. S. Code, Title 46, Sec. 808 33
U. S. Code, Title 22, Sec. 88 (R. S. 1718) ..... ~~50~~ 53

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 249.

LIVINGSTON H. McCREA,
Petitioner,

AGAINST

UNITED STATES OF AMERICA, as owner of the S. S. AMERICAN SHIPPER, engines, tackle, apparatus, etc.,
Respondent.

BRIEF OF PETITIONER.

I.—The Decisions of the Courts Below.

The decision of the United States Circuit Court of Appeals for the Second Circuit was rendered on April 29, 1934 (R., 145-150). It is reported in 70 Fed. (2) 632. On May 7, 1934 the decree of the United States Circuit Court of Appeals, affirming the decree of the District Court, was entered (R., 150).

The decree of the United States District Court for the Southern District of New York, dated August 12, 1932, and entered August 15, 1932, appears on page 109 of the record.

The opinion of Judge Knox of the United States District Court, dated July 26, 1932, appears on pages 102-107 of the record, and is reported in 3 Fed. Sup. 184.

The decree of the United States District Court, dated March 8, 1933, and entered March 9, 1933, appears on pages 115 and 116 of the record.

The opinion of Judge Knox of the United States District Court, dated February 10, 1933, appears on pages 110-115 of the record, and is reported in 3 Fed. Sup. 184, 187.

II.—Jurisdiction.

(1) The date of the decree to be reviewed is May 7, 1934, and will be found on page 150 of the record.

Grounds of This Court's Jurisdiction.

(2) This case involves important questions of maritime law, affecting seamen and shipping interests generally, which frequently arise before both federal and state tribunals, but have not heretofore been definitely decided by this Court (R., 118-124, 134-141, 145-150).

(3) Construction of U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746, and the cognate provisions of the Seamen's Acts of December 21, 1898, March 4, 1915, and March 9, 1920.

(4) Construction of the Fifth Amendment to the Constitution of the United States, particularly that portion thereof which provides that no person shall "be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

III.—Statement of the Case.

A. The Facts.

The S. S. *American Shipper* was owned by the United States (R., 10) and registered in the name of the United States Shipping Board (Respondent's Exhibit B, R., 94a), and was operated as a merchant vessel engaged in the common carriage of goods and passengers by sea for hire. This is admitted by the respondent (R., 4, 8-9; Respondent's Exhibit B, R., 94a). This was also found by the

decision of the United States Circuit Court of Appeals (R., 145). It was also found by the United States Circuit Court of Appeals that the S. S. *American Shipper* was subject to the provisions of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673) (R., 145).

On February 15, 1928, the libellant, petitioner herein, signed shipping articles for a voyage on the S. S. *American Shipper* from the Port of New York to the Port of London, Kingdom of Great Britain, and return, at wages of $65 per month (R., 3, 11).

The S. S. *American Shipper* carried on the voyage a crew of ten able seamen, two ordinary seamen, and one additional person who was rated as an able seaman (R., 11, 12, 45, 103). She also carried six firemen, three water tenders and eight oilers (R., 11).

On the voyage from the Port of New York to the Port of London the crew of the vessel S. S. *American Shipper* was not divided into equal watches as required by Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673). This appears even accepting the testimony offered by the respondent (R., 103).

On arrival at the Port of London the libellant, the petitioner herein, demanded his discharge from the vessel and the payment of his wages earned on the ground of the violation of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673). He also demanded one month's additional pay and transportation back to the United States under the provisions of R. S. 4583 (46 U. S. C. 685) (R., 40, 192-193). These demands were refused. *At that time he was not entitled to and did not demand any double wages under the provisions of 46 U. S. C. 596; R. S. 4529.* At the request of the captain, the libellant, petitioner herein, went to the office of the American Consul next morning and made a full statement of the case to him. The Consul stated that even if Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673) had been violated, he did not think the libellant, petitioner

herein, was so affected by what he, the Consul, considered a "technical violation of the statute," that he was entitled to his discharge, and he refused to have him discharged (R., 77-78, 85-86). The Consul also testified (R., 86):

> "* * * In the third place, I did not consider that the alleged violation of Section 2 of the Seamen's Act of March 4, 1915, was of a nature sufficiently serious to justify the discharge of a member of the crew with arrears of wages, one month's extra wages, and transportation back to the United States * * *."

The libellant returned to the vessel and did his utmost to see the captain, but was unable to do so. He later left the vessel without having been paid any part of the wages due him, and was not even permitted to take his clothes. The vessel sailed for the Port of New York on March 2, 1928. The libellant, petitioner herein, was unable to secure money to pay his transportation back to the United States for three or four weeks. Within a month he returned to the United States (R., 21) and this action was started July 11th, 1928 (R., 1).

B. The Proceedings in the Trial Court.

The action was begun by the libellant, the petitioner herein, on or about July 9, 1928. In his libel he demanded judgment for the wages due him on February 26, 1928, one month's additional wages, the amount of costs incurred in securing transportation back to the United States, the return of his clothes, and also two days pay for each of the days the wages due him were not paid from the time of demand until the time when the same were paid (R., 2-7).

The respondent (R., 8, 9) admitted that the S. S. *American Shipper* was a merchant vessel and carried passengers and merchandise consigned to and shipped by private parties.

The action came on for trial before Judge Knox on May 6, 1932 (R., 10).

On or about July 26, 1932, Judge Knox handed down his decision (R., 102-107). He held that even according to the testimony submitted by the respondent, Section 2 of the Act of March 4, 1915 (46 U. S. C. 673) had been violated, and that the libellant, petitioner herein, was entitled to his discharge and the wages earned at that time (R., 103). He also held that:

> "• • • The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from a 'sufficient cause,' "

and that the libellant, the petitioner herein, was entitled to two days pay for one from the time of the commencement of the action to the date of the entry of the decree (R., 107).

The Trial Court also held that the libellant, the petitioner herein, was not entitled to one month's additional pay and the cost of transportation back to the United States, as provided for by R. S. 4583 (46 U. S. C. 685), for the reason that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. C. 673) for the violation of that section, was exclusive (R., 104, 105).

The decree was signed by Judge Knox on Friday, August 12, 1932 (R., 109), and was entered on Monday, August 15, 1932 (R., 109). In a letter dated August 13, 1932 (Saturday), after the decree had been signed, the proctor for the respondent wrote to Judge Knox stating that his attention had been called to two cases which he believed held that the relief, provided for by R. S. 4529 (46 U. S. C. 596), was a penalty, and that it could not be recovered against the United States, and he requested a rehearing of the case (R., 108).

There is absolutely no evidence to show when this letter reached Judge Knox, whether it was before or after

the entry of the decree on Monday, August 15, 1932, or to show that the Clerk of the Court knew anything of it. It appears from the record that the decree must have been sent to the Clerk to be duly entered and that he did so. Nowhere does it appear that the court ever notified the clerk not to enter the decree. There is nothing in the record to show that the Court took any notice of the application for a rehearing until on or about August 30, 1932, when it granted a rehearing of the suit (R., 110).

On or about February 10, 1933, the Court handed down a decision holding that the relief, provided for by R. S. 4529 (46 U. S. C. 596), was a penalty, and that said relief could not be recovered against the respondent (R., 110, 115).

The District Court in its decision did not pass upon the question as to whether or not, even if the relief, provided for by R. S. 4529 (46 U. S. C. 596), were a penalty, the respondent, the United States, had waived any immunity it might have been entitled to as a sovereign by entering into commercial business in competition with private owners, and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2 and 6 (U. S. Code, Title 46, Sections 741, 742, 746).

The decree was entered on or about March 9, 1933 (R., 115, 116), and an order allowing an appeal from this decree was duly signed and filed May 16, 1933. On that date assignments of error were also duly filed (R., 118, 124). On July 16, 1933, the United States Attorney moved for an order amending the decree filed March 9, 1933, by inserting a clause therein vacating and setting aside the decree entered August 15, 1932 (R., 124, 128). The motion was opposed (R., 128, 131), but was granted. An order amending the decree of March 9, 1933, by inserting a clause therein vacating the decree entered August 15, 1932, was entered on July 18, 1933 (R., 132-133).

On August 10, 1933, an appeal from the amended decree entered July 18, 1933, was allowed in the District

Court, and new assignments of error were filed by the libellant, the petitioner herein, which questioned, in addition to the issues previously raised, the power of the District Court to amend the decree of March 9, 1933, and to vacate the decree of August 15, 1932, by the amended decree of July 18, 1933 (R., 134-141).

C. The Proceedings on the Appeal

The transcript of the record was duly certified by the Clerk of the United States District Court on October 13, 1933. The case was promptly docketed on or about October 13, 1933 (R., 143), without prepayment of costs, by virtue of the provisions of U. S. Code, Title 28, Section 837, under which petitioner now brings his application to this Court. A hearing was thereafter had in the United States Circuit Court of Appeals on February 14, 1934, and a decision was handed down on or about April 29, 1934 (R., 145-150). The decree of the United States Circuit Court of Appeals was entered May 7, 1934 (R., 150).

In its decision the Circuit Court of Appeals, although stating that in a number of cases, including the case of *Vincent* v. *United States* (272 Fed. 889), which had been decided by the Circuit Court of Appeals for the Ninth Circuit, it had been held that the relief of two days pay for one, provided by R. S. 4529 (46 U. S. C. 596), was not a penalty but was compensation or wages, held nevertheless that they would follow the decision in the case of *Missouri Pacific R. R. Co.* v. *Ault* (256 U. S. 554). That case construed a statute of the State of Arkansas and held that the relief provided for by the Arkansas statute was a penalty and that it could not be recovered against the respondent, the United States, which was operating a railroad in the State of Arkansas under a war measure. The Circuit Court of Appeals in the case at bar accordingly held that the relief, provided for by R. S. 4529 (46 U. S. C. 596), was a penalty and not compensation or

wages, and that said relief could not be recovered against the respondent, the United States (R., 148, 149).

The Circuit Court of Appeals also failed or neglected to pass upon the question as to whether or not, even if the relief, provided for by R. S. 4529 (46 U. S. C. 596), were a penalty, the respondent, the United States, had waived any immunity it might have been entitled to as a sovereign by entering into commercial business in competition with private owners, and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2 and 6 (46 U. S. C. 741, 742, 746).

The District Court held that the libellant, the petitioner herein, could not recover for the additional one month's pay and the cost of transportation back to the United States, although he had been discharged in a foreign country on account of the violation of Section 2 of the Act of March 4, 1915, Chapter 155 (46 U. S. C. 673) by the respondent, the United States, for the reason that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. C. 673), was exclusive (R., 104, 105). The Circuit Court of Appeals did not in any way whatsoever pass upon the question of whether or not the relief under Section 673 were exclusive, but held that the libellant, petitioner herein, was not entitled to the relief provided by R. S. 4583 (46 U. S. C. 685), and based its decision upon the fact that the libellant, petitioner herein, had not been discharged by the American Consul at London. Whether by inference it might be said that the Circuit Court of Appeals decision meant or implied that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. C. 673), is not exclusive, and that if the petitioner herein had been discharged by the American Consul, or if his discharge by the Master had been approved by the Consul, he would have been entitled to the relief, provided for by R. S. 4583 (46 U. S. C. 685), does not appear.

The Circuit Court of Appeals also held that when the libellant, the petitioner herein, left his vessel in London, without being discharged by the American Consul, he "deserted his ship" (R., 149), although it had been held by the District Court that he was entitled to his discharge, to leave his ship, and to receive the wages earned (R., 103). It had also been held by the United States Supreme Court that under those conditions he was not a deserter and was entitled to his discharge and to receive the wages earned and could bring an action therefor. *O'Hara* v. *Luckenbach Steamship Co.* (269 U. S. 364).

The Circuit Court of Appeals also stated in its opinion (R., 216):

> "This libellant had made himself somewhat familiar with the provisions of the Seamen's Act before signing on and also with the decision of the Supreme Court in *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364. One of his reasons for becoming a member of the crew of this ship was to take advantage of any violation of the law."

These are not the facts. There is absolutely nothing in the record which supports this statement. The United States Supreme Court in the case of *O'Hara* v. *Luckenbach S. S. Co.* (*supra*), had recently construed Section 2 of the Act of March 4, 1915 (46 U. S. C. 673). This decision was of the utmost importance to seamen and was discussed in the *Seamen's Journal*, where it had been read by the libellant (R., 20).

The appellate court is controlled in its decisions by facts shown by the record, and statements of other facts, either in the parties' briefs or on the argument, or otherwise, may not properly be received or considered.

Leonard v. *Fields*, 71 Fed. (2d) 483.

No assignments of error were taken or filed and no appeal was taken from the decisions and judgments of the

District Court by the respondent (R., 148), and no petition for a writ of certiorari was filed by it in the United States Supreme Court.

A petition for a writ of certiorari was duly filed on behalf of the petitioner herein. It was allowed and an order to that effect was entered in the office of the clerk of this Court on the eighth day of October 1934.

IV.—Specification of Errors.

The errors assigned and intended to be urged are as follows:

(1) The denial of the right of the petitioner, an unpaid seaman, to a judgment or decree *in personam* for the statutory double wages, the relief provided by U. S. Code, Title 46, Section 596, incurred by reason of the refusal and neglect of the respondent, the United States, to pay petitioner the wages claimed by him in his libel and found to be due on account of the violation of U. S. Code, Title 46, Section 673, by the respondent, the United States, on the ground that said double wages provided for by said U. S. Code, Title 46, Section 596, did not constitute compensation or wages, but constituted a penalty, and could not be recovered against the respondent, the United States; (Assignments of Error Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39 (R., 120-122, 124); Assignments of Error Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, R., 136-140); and on the ground that the said respondent, the United States, did not divest itself of all sovereign character and waive immunity by entering into commercial business in competition with private owners and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2, 6 (46 U. S. C. 741, 742, 746) (Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 122-124; Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 138-140).

(2) The denial of the right of the petitioner, an unpaid seaman discharged in a foreign country, to a judgment or decree *in personam* against the respondent, the United States, for one month's pay and the cost of transportation back to the United States, as provided for in U. S. Code, Title 46, Section 685 (R. S. 4583), in addition to his discharge and wages earned under Section 2 of the Act of March 4, 1915 (46 U. S. C. 673), on the ground that said relief provided for by Section 2 of the Act of March 4, 1915 (46 U. S. C. 673) was exclusive (Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 39 (R., 118-120, 124); Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 39 (R., 134-136, 140).)

(3) The denial of the right of the petitioner, an unpaid seaman discharged in a foreign country by reason of the violation by the respondent of U. S. Code, Title 46, Section 673, to a judgment or decree *in personam* against the respondent, the United States, for one month's pay and the cost of transportation back to the United States, as provided for in U. S. Code, Title 46, Section 685 (R. S. 4583), in addition to his discharge and wages earned under Section 2 of the Act of March 4, 1915 (46 U. S. C. 673), on the ground that the petitioner was not discharged by the United States Consul at London, Kingdom of Great Britain, and that said petitioner was a deserter (R., 149, 150).

(4) Whether it was proper for the United States Circuit Court of Appeals to hold that the action of the District Court, in allowing a reargument of the case on the ground that the relief, provided for by U. S. Code, Title 46, Section 596, was a penalty and that the respondent, the United States, could not be held for a penalty, was correct, in view of the fact that the respondent, the United States, had not pleaded that the relief, provided for by U. S. Code, Title 46, Section 596, was a penalty

and that said respondent, the United States, had made no motion to amend its pleadings. (Assignments of Error 38, R., 124, Decision C. C. A., R., 145-150, 140, Assignments of Error, R., 38, 145-150).

(5) The findings of the United States Circuit Court of Appeals that the entry of the judgment or decree of August 15, 1932 was irregular, and that said decree was vacated and set aside by a granting of a rehearing after the entry of the said judgment or decree of August 15, 1932 (Assignments of Error Nos. 40, 41, 42, 43, R., 140, 141, Decision C. C. A., 147, 148).

V.—Argument.

POINT I.

Section 2 of the Act of March 4, 1915, was violated, and the libellant was entitled to his discharge and to his wages earned; and his wages earned were withheld without "sufficient cause."

Section 2 of the Seaman's Act provides as follows:

> "*Requirements as to watches; duties of seamen; right to discharge.*—In all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays, or sounds exclusively, the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor shall those shipped for deck duty be required to work in the fireroom, or vice versa; but these provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when, in the judgment of the master or other officer, the whole or

> any part of the crew are needed for the maneuvering of the vessel or the performance of work necessary for the safety of the vessel or her cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, and other drills. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, nine hours inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section, the seaman shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to fishing or whaling vessels or yachts."

The trial court found that, according to the testimony of the respondent's own witness (Captain Cummings, R., 38-52), Section 2 of the Act of March 4, 1915 (c. 153, sec. 2, 38 Stat. 1164; 46 U. S. C. 673) known as the Seaman's Act, had been violated, and that the libellant was entitled to his discharge when the vessel reached London, and to the wages earned (R., 103); and that the purpose of the statute "was to promote safety at sea rather than to regulate the working conditions of the men" (R., 103). It also found that the libellant was entitled to two days' pay for one, from the time the action was begun (R., 107) to the entry of the decree. It also found that:

> "• • • The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from 'a sufficient cause'" (R., 107).

The Trial Court also found that the fact that the vessel carried a larger crew than required by the certificate of inspection did not relieve the ship from compliance with the statute (R., 103).

> *Southern Pacific S. S. Co.* v. *Hair, et al.*, 24 Fed. (2) 94.

The District Court, in its opinion dated February 10, 1933 (R., 110-115), did not in any way change or modify these findings. The respondent took no appeal from these findings. In fact, it took no appeal whatsoever, and said findings were not questioned in the decision of the Circuit Court of Appeals (R., 145-150).

In the case at bar, the Circuit Court of Appeals, referring to the S. S. *American Shipper*, found (R., 145):

> "• • • It was owned by the United States and was a merchant vessel subject to the provisions of Sec. 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. Sec. 673) relating to watches; their duties; and their right to discharge.
>
> "There were thirteen seamen on the vessel and they were not, while at sea, divided as equally as that number permitted into watches and kept on duty successively as the above statute required. Instead of this, there were three watches of three men each and the remaining four were kept on day duty and not included in any watch."

In the case of *O'Hara* v. *Luckenbach S. S. Co.* (269 U. S. 354), the libellants first asked for their discharge without assigning any reason. They were refused. They then applied for discharge on account of disability and were refused. They then claimed discharge on the ground of the violation of Section 2 of the Seamen's Act of March 4, 1915, C. 153, 38 Stat. 1164; (46 U. S. C. 673), and were refused. The libellants then left the vessel and later brought an action for wages earned. The defense was that the libellants deserted the vessel (*O'Hara* v.

Luckenbach S. S. Co., 1 Fed. (2) 923). The United States Supreme Court held that they had not deserted their vessel and were entitled to their discharge and wages earned. In its opinion (*O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 367) the court said:

> "• • • The general purpose of the Seaman's Act is not only to safeguard the welfare of the seamen as workmen, but, as set forth in the title, also to promote safety at sea.'"
>
> "• • • And not only is the division confined to those of the crew engaged in the mechanics of conducting the ship on her voyage, but the imperative requirement is that the watches into which they are divided 'shall be kept on duty successively,' that is to say by turns, so that one watch must come on as another goes off. The evident purpose was to compel a division of the men for duty on deck and in the fireroom and continuity of service, to the end that in those departments the ship should *at all times* be actively manned with equal efficiency."

And (p. 368):

> "• • • *But the provision, fundamentally, is a measure of precaution against those perilous and often unexpected emergencies of the sea when only immediate and wakeful readiness for action may avert disaster or determine the issue between life and death;* its effect as a regulator of working conditions is a matter of subordinate intent." (Italics ours.)

Strathearn v. *Dillon*, 256 Fed. 631; 252 U. S. 348; *Thompson, etc.* v. *Lucas, et al.*, 252 U. S. 358.

The case of *O'Hara* v. *Luckenbach S. S. Co.* (269 U. S. 364) clearly sets out the reason and necessity for safety laws at sea, including Section 2 of the Seamen's Act. The court said (p. 368):

> "But it is apparent from the hearings and debates, that Congress looked forward to disasters like those of the *Titanic* and the *Volturno* (the facts of

> which had been submitted to inquiry by its committees), where, in the one, the lack of lifeboats, probably caused the loss of many lives, although in a quiet sea, and where in the other, lifeboats lowered in a great storm were engulfed, it was thought by some, from the absence of the skill of able seamen in launching them, or like that of the *Rio de Janeiro* (*In re Pacific Mail S. S. Co.*, 130 Fed. 76; 64 C. C. A. 410; 69 L. R. A. 71), which sank with many of its lifeboats unlaunched because the crew of Chinese sailors were unable to understand the language in which the orders of their officers were given."

The need for these safety laws at sea and for their strict enforcement clearly appears from the recent appalling catastrophe of the *Morro Castle*. Among the charges preferred by the Board of Inquiry of the United States Steamboat Inspection Service against Acting Captain Warms and others was the charge:

> "5. That you failed to have your deck crew divided into equal watches as required by the Seamen's Act, and thereby reducing the number of men on watch at the time the fire was reported, thus unduly jeopardizing the lives of the passengers and crew."

According to the reports in the newspapers the report of the said Board of Inquiry said:

> "• • • • that the required deck crew, consisting of 15 able seamen, seven ordinary seamen, three quartermasters and three deck watchmen, were not divided into equal watches and that only the three quartermasters, three watchmen, three able seamen and three ordinary seamen were standing watches. The balance of the crew were assigned to day work, thereby reducing the number of men on watch considerably at the time the fire was reported."

In the case at bar the trial court found as a question of fact that the respondent violated Section 2 of the Sea-

men's Act (46 U. S. C. 673); that the petitioner was entitled to his discharge (R., 103), and that there was not sufficient cause for the withholding of his wages (R., 107). These findings were approved by the Circuit Court of Appeals (R., 145). The respondent did not question this portion of the decision of the trial court, and did not appeal therefrom. In fact, the respondent did not take any appeal whatsoever from any of the decrees entered herein (R., 148).

The petition herein by the petitioner for a writ of certiorari was granted by this court. No petition for a writ of certiorari was filed by the respondent and none was granted. This court should not allow the respondent to raise any questions as to which there have been concurrent findings in favor of the petitioner by both the District Court and the Circuit Court of Appeals and from which no appeal has been taken.

Lloyd v. *Elting*, 287 U. S. 329;
The Carib Prince, 170 U. S. 655, 658;
Spencer, Kellogg & Son v. *Hicks*, 285 U. S. 502, 510.

POINT II.

The relief, provided for under the Seamen's Act of March 4, 1915, Chapter 153, Section 3, R. S. 4529 (46 U. S. C. 596), is compensation or wages and not a penalty.

In the case at bar it was found by the trial court that:

> "• • • • The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from 'a sufficient cause'" (R., 107).

That the wages due the libellant at the time of his discharge were withheld without "sufficient cause" or with-

out reasonable cause is clear, and he is entitled to double wages from the time the *American Shipper* cleared, March 2, 1928, or from the date of the bringing of this action. In *Southern Pac. S. S. Co.* v. *Hair, et al.* (24 Fed. (2d) 94), it is said (p. 95):

> "Under Section 3 of that act the master's failure, without sufficient cause, to pay such wages, had the effect of entitling the appellees to a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods which sum shall be recoverable as wages in any claim before the court."

O'Hara v. *Luckenbach S. S. Co.*, 269 U. S. 364;
Southern Pacific Co. v. *Hair, et al.*, 24 Fed. (2d) 94;
El Ostero, 14 Fed. (2d) 349;
Strathearn S. S. Co. v. *Dillon*, 256 Fed. 631; 252 U. S. 348.
Thompson, etc. v. *Lucas, et al.*, 252 U. S. 358.

The respondent does not appear to claim that the wages due the libellant at the time he asked for his discharge were refused with "sufficient cause" or "reasonable cause." It apparently admits that, had the respondent been any one other than the United States or some other sovereign state, the libellant would be entitled to recover under R. S. 4529. It is argued, however, that no recovery can be had against the United States, for the reason that the relief provided in R. S. 4529 is a penalty, and that no recovery can be had against the United States for a penalty.

The relief of two days' pay for one, provided for under R. S. 4529 (46 U. S. C. 596), is compensation or wages and not a penalty.

The decision of the District Court and that of the Circuit Court of Appeals that said relief was a penalty is in conflict with the Fifth Amendment to the Constitution of

the United States, with the statute itself, with the decisions of this Court, and with the decisions of the United States Circuit Court of Appeals for the Ninth Circuit, the United States District Court for the districts of Maryland and South Carolina, as well as the courts of last resort in New York and Massachusetts.

R. S. 4529, Act of March 4, 1915, Chapter 153, Section 3 (46 U. S. C. 596) provides:

> "*Time for payment.* The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage."

The Circuit Court of Appeals in its decision admits that the relief, provided for in the statute in question (R. S. 4529; 46 U. S. C. 596), has been held to be compensation or wages, and judgment granted and entered, in an action against the United States (*Vincent* v. *United States*, 272 Fed. 889), and that in a number of other cases, where the question has been raised as to whether

or not the relief is a penalty, it has been decided that it was compensation or wages and not a penalty (R., 148). No reported case had held such relief to be a penalty, except for dicta in a District Court case, *Corrigan* v. *United States* (293 Fed. 610).

Congress has expressly said that the compensation provided for by R. S. 4529 shall be "*recoverable as wages.*" It is part of the contract between and entered into by the seamen and the United States as the ship owner.

All the statutes providing for the relief of a seaman become and are a part of the contract with him when he signs shipping articles. This clearly makes the relief provided by the statutes a contractual liability and not a penalty.

> *Covert* v. *British Brig Wexford*, 3 Fed. 577, 578;
> *Cox* v. *Lykes Bros.*, 237 N. Y. 376, 381;
> *The Steel Trader*, 275 U. S. 388, 391.

In the case of *Vincent* v. *United States* (272 Fed. 889), judgment was allowed against the respondent, the United States (who is the respondent in this case), for the relief provided for in the statute R. S. 4529 (46 U. S. C. 596). The *Vincent* case was decided by the United States Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals in its opinion in the present case states that in the *Vincent* case the question of whether or not the relief, provided for under said statute, was compensation or wages, was not discussed. It must be presumed, however, that in considering the *Vincent* case the Court had in mind all questions of facts and law involved and considered the same.

> *United States* v. *Texas*, 143 U. S. 621, 642;
> *Danks* v. *Gordon*, 272 Fed. 821, 823.

Not only in this, but in subsequent cases before the same Court, the United States Circuit Court of Appeals

for the Ninth Circuit, it was held that the relief provided for in said statute did not constitute a penalty but was for compensation or wages earned.

In *Gerber* v. *Spencer* (278 Fed. 886), the court said:

> "We adopt the clear statement by Judge Choate in *Covert* v. *British Brig Wexford* (D. C.), 3 Fed. 577, 578, 'These statutes are designed for the protection of seamen, to prevent the abuse of withholding their pay, and thereby keeping them in port at expense and out of employment while waiting for a settlement. It is a liquidated indemnity, relief for such enforced expense and delay.'"

In the case of *Buckley* v. *Oceanic Steamship Co.* (5 Fed. (2) 545, C. C. A., 9th Circuit), the same court and two of the same judges, who had decided the *Vincent* case, the opinion of Hunt, *J.*, being concurred in by Gilbert and Rudkin, *JJ.*, said (p. 546):

> "• • • The nature of the statute (R. S. 4529), whether it is remedial or penal, has been considered *by this and other courts*, which have held that sums recoverable under its provisions are treated as wages—compensation to seamen, rather than the punishment of the master. *Gerber* v. *Spencer* (C. C. A.) 278 Fed. 886; *Cox* v. *Lykes Bros.*, 237 N. Y. 376, 143 N. E. 226." (Italics ours.)

And also (p. 546):

> "In as much as the claim for the two days' pay under Sec. 4529, *supra*, is for extra wages as incidental to the wages proper, it stands upon no different basis than does the claim for wages proper"

It has also been held in a number of other cases that the relief provides for compensation or wages and not for a penalty.

The Fort Gaines, 18 Fed. (2) 413;
The Chester, 25 Fed. (2) 908;
The Trader, 17 Fed. (2) 623.

This Court, in the case of *Collie, et al.* v. *Fergusson, et al.* (281 U. S. 52), said (p. 54):

> "The claim for double wages which, when valid, is by the terms of the statute '*recoverable as wages,*' has been held to be embraced in the seaman's lien for wages with priority over other liens, and governed by the procedure applicable to suits for the recovery of seamen's wages * * *." Citing cases. (Italics ours.)

Throughout the opinion in the *Collie* case, Mr. Justice Stone refers to the relief provided by the statute as "a liability." It was denied the libellant on the ground that the failure to pay the wages was with "sufficient cause" and so was justified. In the case at bar, it has been held both by the District Court and by the Circuit Court of Appeals that the failure to pay the wages was "without sufficient cause."

The same question came before the Court of Appeals of the State of New York in the case of *Cox* v. *Lykes Bros.*, defendant, and *United States Shipping Board Emergency Fleet Corp.*, defendant-respondent (237 N. Y. 376).

The complaint against the defendant Lykes Brothers had been dismissed (204 A. D. 442), and the defendant *United States Shipping Board Emergency Fleet Corporation was the sole respondent* in the Court of Appeals. The opinion therein was written by Mr. Justice Cardozo. As was stated in said opinion, the vessel in question was registered in the name of the United States of America and was operated by the United States Shipping Board Emergency Fleet Corporation through Lykes Brothers as agents. The question raised on this appeal was whether or not R. S. 4529 (46 U. S. C. 596) provided for compensation or wages, or for a penalty, and whether an action therefor could be brought in a state court. The Court held that it provided for wages or compensation

and did not provide for a penalty. The Court said (p. 379):

> "The Appellate Division found the present suit to be one for a penalty or forfeiture within the meaning of this statute. We do not so regard it. Congress has expressly said that the extra compensation, when due, 'shall be recoverable as wages.' This would seem decisive, without more, that in determining the bounds of jurisdiction, it is not to be classified as a penalty. There was no thought that the state courts, which have undoubted jurisdiction to give judgment for wages in the strict sense, should be shorn of jurisdiction to give judgment for the statutory incidents. This conclusion is fortified when we search for the purpose of the statute. The purpose, or at least the predominant one, was not punishment of the master or owner, but compensation to the seaman. Delay means loss of opportunity to ship upon another vessel. It means hardship during the term of waiting, the sufferer, often improvident, and stranded far from home. 'In all fairness he should recover more than the amount due him for wages earned' (*Calvin* v. *Huntley*, 178 Mass. 29, 32). How much this extra amount should be would be often a troublesome question, if it were left open in every case. *'Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which, therefore, should be taken to be the law of the contract'* (*Calvin* v. *Huntley, supra; Gerber* v. *Spencer*, 278 Fed. Rep. 887; *Covert* v. *British Brig Wexford*, 3 Fed. Rep. 577, 578, 579). The case cited from Massachusetts is authority for the ruling that an action for extra wages under section 4527 of the United States Revised Statutes, which does not differ in essentials from section 4529, may be maintained in the state courts and is not an action for a penalty * * *." (Italics ours.)

The same construction of a similar statute, R. S. 4527 (46 U. S. C. 594), was given in the case of *Calvin* v.

Huntley (178 Mass. 29, 32), in which decision Mr. Justice Holmes, later a member of this Court, concurred.

An action for extra wages, under R. S. 4527 (46 U. S. C. 594), does not differ in essentials from R. S. 4529 (46 U. S. C. 596). *Cox* v. *Lykes Bros.* (237 N. Y. 376, 379). R. S. 4527 (46 U. S. C. 594) provides:

> "Right to wages in case of improper discharge.—Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned."

In the case of *United States Steel Products Co.* v. *Adams* (*The Steel Trader*, 275 U. S. 388), which was brought under R. S. 4527, it was said (p. 391):

> "The word compensation, in Sec. 4527, distinctly indicates that payment of a sum equal to one month's wages was intended to constitute the remedy for invasion of the seaman's rights through breach of his contract of employment in the circumstances specified. 'Damages consist in compensation for loss sustained * * * By the general system of our law, for every invasion of right there is a remedy, and *that remedy is compensation.* This compensation is furnished in the damages which are awarded.' Sedgwick's Damages, 9th Edition, Vol. I, p. 24. See also *Bauman* v. *Ross*, 167 U. S. 548. The provision that such sum may be recovered 'as if it were wages duly earned' permits the seaman to enforce payment by the special and summary methods provided for collecting his ordinary wages.
>
> "In *Calvin* v. *Huntley* (1901) 178 Mass. 29, 32, we think the Supreme Court of Massachusetts

properly interpreted Sec. 4527, and in respect of it rightly said:

> "'It speaks not of punishment but of compensation, its object is to protect the seaman from loss rather than to punish the master for discharging him. *The remedy is given to the seaman alone, and its plain purpose is to furnish a clear and well defined rule of damages as between him and the master for a breach of contract in which the seaman and the master or owner are the only persons interested* * * * Nor does the rule of damages seem unreasonable. The shipping contract calls upon the seaman to go to various places, sometimes far from home, and it may be, for instance as in this case was the actual fact, that he may be discharged in a port distant from that where he signed the articles, or where he can not immediately secure any other employment on board ship or elsewhere, and that in all fairness he should recover more than the amount due him for wages earned. Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which therefore should be taken to be the law of the contract. *The object of the statute is not to punish but to provide a reasonable rule of compensation for a breach of contract.* We think the statute not penal but remedial * * *.'" (Italics ours.)

As was said in *Calvin* v. *Huntley* (178 Mass. 291 at p. 31):

> "It is to be observed that the language of the section is not that ordinarily used in a penal statute. Neither the word 'penalty' nor 'forfeiture' is in it. Moreover it does not provide punishment for the commission of a criminal offense nor for the neglect of a statutory duty, nor even for the neglect of a duty in the performance of which the public as such may be supposed to have an interest."

In practically all cases, where the question of the construction of R. S. 4529 (46 U. S. C. 596) or R. S. 4527 (46 U. S. C. 594), has come in question in actions pending in the federal courts and courts of various states, it has been held that the relief provided for in said sections constituted compensation or wages and not a penalty and was part of the contract.

In all cases where the relief under these statutes has been refused it has been on the ground that the failure or refusal to pay the wages due was with "sufficient cause."

The Circuit Court of Appeals in its opinion (R., 148) admits that in the cases in which the question has been raised of whether or not the relief, provided for by R. S. 4529 (46 U. S. C. 596), is a penalty, or wages or compensation, it has been held that it is wages or compensation and not a penalty.

The Trial Court and the Circuit Court of Appeals base their opinions that the relief, provided for by said statute, is a penalty and not wages or compensation, on the case of *Missouri Pacific R. R. Co.* v. *Ault* (256 U. S. 554). That case involved the construction of a statute of the State of Arkansas, which stated specifically that the relief was a penalty, and also involved what is known as the Federal Control Act.

In the *Ault* case (*supra*), the President had taken possession of the Missouri Pacific Railroad pursuant to the Proclamation of December 26, 1917 (40 Stat. 1733), under the Act of August 29, 1916 (C. 418, 39 Stat. 619, 645). In the last named statute (39 Stat. 645), it was provided:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and *to utilize* the same, *to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equip-*

> *ment*, or for such other purposes connected with the emergency as may be needful or desirable." (Italics ours.)

In said case the Court said (p. 559):

> "The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President *for war purposes* was not to be disturbed." (Italics ours.)

The railroad was being operated as a *war measure* under the said act (39 Stat. 645) *for the transportation and transfer of troops, war material and such other purposes as might be connected with the emergency as might be useful and desirable, to the exclusion of other traffic* which authority was confirmed by the Federal Control Act of March 21, 1918 (C. 28; 40 Stat. 1763). As is said in the *Ault* case (p. 559):

> "• • • but the property in the hands of the President *for war purposes* was not to be disturbed." (Italics ours.)

In the case at bar, *McCrea* v. *United States*, the government was operating the merchant vessel, S. S. *American Shipper* in competition with private owners, and under the provisions of the Suits in Admiralty Act.

Judge Cardozo clearly distinguished the statute involved in the *Ault* case, and R. S. 4529 (46 U. S. C. 596), in his opinion in *Cox* v. *Lykes Bros., et al.* (237 N. Y. 376), saying (p. 380):

> "We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer • • • The nature of the problem will determine whether we are to take one viewpoint or the other. *From the viewpoint of the government (in the Ault case) the court found this provision predominantly penal as well it might, not only because the statute (of Arkansas) so declared, but also because of the differing situation*

> *of seamen on the one hand and railroad workers on the other. Here (referring to the Cox. v. Lykes case), Congress imposing a liability for the benefit of seamen, has put it on the same plane as a liability for wages, and has said that the two shall be enforcible together.*" (Italics and words in parentheses ours.)

It will be noted that in the case of *Cox* v. *Lykes Bros.* (*supra*), the defendant involved was not a private corporation, as stated by the District Court in the case at bar (R., 113). In the *Cox* case the complaint against the defendant Lykes Brothers, a private corporation, had been dismissed in the trial court (*Cox* v. *Lykes Bros., et al.*, 204 A. D. 442). The sole respondent on the appeal was the United States Shipping Board Emergency Fleet Corp. (*Cox* v. *Lykes Bros. & U. S. Shipping Board Emergency Fleet Corp.*, 237 N. Y. 376).

The Circuit Court of Appeals (9th Circuit), in a long line of decisions, clearly sets out the distinction between the situation where the United States is engaged in private business (as in the *McCrea* case, and in the cases just cited), and that where it is engaged in a governmental capacity as a war measure (as in *Missouri Pacific R. R. Co.* v. *Ault, supra*). In the case of *Ballaine* v. *Alaska Northern Ry. Co.* (259 Fed. 183) it said (p. 185):

> "The act of March 12, 1914, ch. 37, heretofore cited, which authorizes the President to locate, construct and operate railroads in Alaska, expressly provides that the Alaska Railroad is *for the settlement of public lands and the transportation of coal for the Army and Navy, for the transportation of troops, arms, munitions of war, the mails, and for other governmental and public uses,* and to transport passengers and property. The act (Section 21) also confers authority upon the President, through such agents as he may appoint or employ, to do all necessary acts, in addition to those specially authorized, to enable him to accomplish the purposes of the Act • • • Taking all these provisions together they plainly show, that the United

> States * * * acted in its sovereign capacity, and in exercising entire control, possession, ownership and management, has merely employed the corporate organization as an agency through which to exercise the purposes of the statute." (Italics ours.)

The court clearly based its decision upon the fact that the government was acting in its sovereign capacity. It is admitted in said decision that if the government had been engaged in a commercial business the rule would have been different.

Referring to the case of *Salas* v. *United States* (234 Fed. 842), which was similar to the case at bar, the court said (p. 185):

> "The Court of Appeals (in the *Salas* case) was of the opinion that the United States had entered into commercial business in the premises and was to be treated like any other corporation * * *."

It thus clearly appears that in its decision in the case of *Vincent* v. *United States* (272 Fed. 889), the Circuit Court of Appeals (9th Circuit) had in mind the fact that the respondent therein was the United States and that the relief, provided for by the statute involved herein, R. S. 4529, Act of March 4, 1915, C. 153, Sec. 3 (46 U. S. C. 596), was not a penalty and could be recovered against the United States. Especially does this appear in the decisions by the same court of:

> *Gerber* v. *Spencer, et al.*, 278 Fed. 886;
> *Buckley* v. *Oceanic S. S. Co.*, 5 Fed. (2) 545.

In the case of *Salas* v. *United States* (234 Fed. 842, C. C. A., 2d Circuit), Salas was charged with conspiracy to defraud the United States. The Panama Railroad Co. was a New York corporation, and was an agency of the United States, all the stock being held by the United

States, and was operated by the War Department. It is said (p. 844):

> "When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation. *Bank of United States* v. *Planters Bank*, 9 Wheat. 904, 6 L. Ed. 244. Although it absolutely owns the Panama Railroad Company and is the only person profiting or losing by its activities, still the Railroad Company sues and is sued just like any other corporation, in its own name."

In its decision herein the Circuit Court of Appeals said (R., 149):

> "• • • The wages earned and due the appellant when he demanded his discharge and his pay on February 26, 1928 amounted to $28.95 and he now claims in addition to that with interest, because of the double wage provision of the statute, about $7,000.00. Obviously such a sum cannot be merely just compensation for delay in paying the wages earned and we feel bound by the decision in the *Ault* case to take a view contrary to that which prevailed in the other cases cited in so far as they may be authority for holding that the United States is subject to the double wage provision of the Seamen's Act (46 U. S. C. A. 596) • • •."

The Circuit Court of Appeals appears to take the position that if the delay in paying the wages had been for only a few days, it might be considered as wages, but the fact that the respondent arbitrarily refused to pay the wages due shows that the said relief must be a penalty.

It clearly appears from the record that any delay in bringing this case to trial was occasioned by the respondent, and that the libellant was not in any way responsible for it and could not in any way have expedited it.

The libel was filed on or about July 11, 1928 (R., 1). The answer of the respondent was filed on or about August 6, 1928 (R., 1).

There were no depositions of any kind taken by or on behalf of the libellant. The depositions of Daniel Miller and Lowell C. Pinkerton, taken on behalf of the respondent, were not taken and filed until May 6, 1929 (R., 1). The deposition of Ian S. MacHardy, taken on behalf of the respondent, was not taken until November 19, 1931 (R., 64). The deposition of Paul C. Neilsen, taken on behalf of the respondent, was not taken until November 2, 1931 (R., 52, 53), while the deposition of Schuyler F. Cumings, captain of S. S. *American Shipper* at the time referred to herein, taken on behalf of the respondent, was taken on or about February 3, 1932 (R., 38). The action came on for trial on May 6, 1932, as soon as it was possible after the respondent had taken its depositions.

In the case of *The Lake Galewood* (21 Fed. (2) 987), a check tendered the seaman had on it "in full settlement." The seaman refused to accept it and later brought an action for his wages and two days' pay for one from the time the pay was due. The court, referring to the large amount of the additional pay of two days' pay for one, said (p. 989):

> "The court therefore, finds that the libellant was entitled to be paid unconditionally on May 1, 1927, and that, since the money was not so tendered at that time, libellant is entitled, under the statute, to an additional sum equal to two days' pay for each and every day from May 1st to the date of the original decree in this case. Such penalty seems disproportionate, but there seems to be no escape, under the language of the statute and the decision in the *Whittemore* case."

The libellant could not have secured a preference or brought the action on for trial prior to the date it was tried. The action was commenced July 11, 1928, a very short time after the libellant was able to secure passage back to the United States, after having been left stranded penniless in England through the act of the respondent.

At the time of the commencement of this action by the libellant there were only three grounds for a preference in the Southern District of New York, which were set out in "General Rules of Practice," Rule 12:

1. Issues in bankruptcy.
2. Causes restored to the calendar.
3. Causes in which any receiver or trustee in bankruptcy is a party.

The action was tried May 6, 1932. About six months later Rule 20 of the "Calendar Rules" was adopted, to go into effect November 14, 1932, which took the place of former Rule 12 and added an additional provision:

> "D. Causes which in the judgment and discretion of the calendar judge are entitled to a preference for exceptional and meritorious reasons."

There was no such provision, however, from the time this action was brought to the time of trial thereof.

POINT III.

The respondent, the United States, waived any immunity to which it was entitled by entering into commercial business in competition with private owners and by the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2, 6 (46 U. S. C. 741, 742, 746).

One of the peculiar things in this action is that both the District Court and the Circuit Court of Appeals, in their decisions, neglected or failed to consider the vital point that, even if the relief, provided for by R. S. 4529 (46 U. S. C. 596), *were a penalty, and not wages or compensation, the respondent, the United States, divested itself of all sovereign character and waived immunity, both by entering into commercial business in competition with private owners, and by and under the Suits in Ad-*

miralty Act of March 9, 1920, Chapter 95, Secs. 1, 2 and 6 (46 U. S. C. 741, 742, 746).

Even before the Suits in Admiralty Act was passed it had been held by this Court, in the case of *The Lake Monroe* (250 U. S. 246), that the vessel, *The Lake Monroe*, was subject to libel even though it was claimed that said vessel was exempt from seizure on the ground that it was the property of the United States. The vessel, *The Lake Monroe*, which was owned by the United States Shipping Board Emergency Fleet Corporation, was libeled on account of damages sustained in a collision. The libellant claimed that the vessel was not exempt from seizure under Section 9 of the Shipping Board Act of September 7, 1916 (46 U. S. C. 808), which read in part:

> Section 808 • • • Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

The court so held, saying (pp. 254, 255, 256):

> "The provisions of Section 9 of the Act of Sept. 7, 1916, that vessels purchased, chartered or leased from the Shipping Board, while employed solely as merchant vessels, should be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States were interested therein as owner or otherwise, was a most material restriction, deemed by Congress to be essential to subject them to the same duties and liabilities as privately owned merchant vessels with which they competed • • •."
>
> "Her service at the time was purely commercial, and she was subject by the terms of the act to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the Government in the outcome of her voyage. • • • We deem it clear, also, that among the liabilities designated by the

> section is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision."

In order to avoid the inconvenience and delay of the seizure of vessels owned by the United States, or in which it had an interest, the Suits in Admiralty Act of March 9, 1920, was passed. In this act, all liabilities of private owners were assumed by the United States, but the vessels owned by it or its corporations were exempt from libel.

> *Eastern Transportation Co.* v. *United States*, 272 U. S. 675.

That it was the intent of Congress that the United States should waive all immunity, and should stand in the same position as the owners of privately owned vessels, clearly appears from the legislative history of the Act which is set forth as Appendix I (pp. 63-71).

It was recognized by Congress that the Suits in Admiralty Act went well beyond the provisions of Section 9 of the Shipping Board Act of 1916, and also well beyond the doctrine of *The Lake Monroe* (250 U. S. 246), as appears in Appendix I (p. 69).

The Suits in Admiralty Act (March 9, 1920, c. 95, Secs. 1, 2, 6; 41 Stat. 525, 525, 527; 46 U. S. C. 741, 742, 746) provides as follows:

> Section 741. Exemption of United States vessels and cargoes from arrest or seizure.—No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its posses-

sions: *Provided,* That this chapter shall not apply to the Panama Railroad Company.

Section 742. Libel *in personam.* In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation • • •.

Section 746. Exemptions and limitations of liability. The United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

In or about the year 1932, an amendment to Section 5 of the Seamen's Act was before Congress. The amendment was for the purpose of allowing actions to be continued against the United States or the United States Shipping Board Merchant Fleet Corporation, formerly known as the United States Shipping Board Emergency Fleet Corporation. On or about June 6, 1932, the Senate Committee on the Judiciary submitted its report, Calendar No. 821, Report No. 771, 72nd Congress, which contains the following statements:

"To Amend Section 5 of the Suits in Admiralty Act"

"Mr. Austin, from the Committee on the Judiciary, submitted the following

"Report

"(To accompany H. R. 7238)

"• • • When the United States Government began to engage in the operation of merchant vessels, it

sought in every way possible to compete for freights with the merchant vessels of private carriers of similar freight, most of which were of foreign nationality. In its competitive efforts to get business, it found itself handicapped because, as a sovereign Government, it could not be sued except by special act of Congress in each case, whereas a private carrier was readily amenable to the process of the courts in the event of death or injury to seamen or of any damage caused by the vessel or its operators to the cargoes or passengers on board. This led to the use of vessels of private carriers in preference to those of the Government.

"In order to remove that competitive handicap, the United States Shipping Board Emergency Fleet Corporation requested Congress to permit seamen, cargo shippers, and passengers on Fleet Corporation vessels to sue the United States in the same manner as if the seamen were employed by, or the cargo were shipped, and the passenger sailed on a privately owned vessel * * *."

In the report, No. 1012, 72nd Congress, 1st Session, submitted by the Committee on the Judiciary of the House of Representatives the intent of the Suits in Admiralty Act also clearly appears, as follows:

"AMEND THE SUITS IN ADMIRALTY ACT"

"Mr. Montague, from the Committee on the Judiciary, submitted the following

"REPORT

"(To accompany H. R. 7238)

"The Committee on the Judiciary, to whom was referred the bill H. R. 7238, after consideration, reports the same favorably with an amendment and recommends that the bill as amended do pass.

"The committee amendment is as follows:

"The chief purposes which Congress sought to accomplish by the passage of the admiralty act were:

"1. To free the United States Government from the embarrassment and necessity of putting up bonds in those cases where United States merchant vessels were seized and suits commenced *in rem.*

"2. To enable the merchant vessels of the United States Fleet Corporation to compete for freights on an equal footing with other American and foreign merchant ships.

"*This was done by abandoning the immunity which the United States enjoyed from suits in personam against the Fleet Corporation for such acts as a private carrier could be sued for in the courts of this country.*

"In this connection, Congress first legislated on the subject in the shipping act of 1916 (39 Stat. 728, c. 451) of which section 9 provides:

"Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien or other interest therein." (Italics ours.)

In the *Matter of Snug Harbor* (283 Fed. 1015), where the question of the Suits in Admiralty Act was raised, it is said (p. 1018):

"* * * So it would seem that Congress, in the passage of the Act of March 9, 1920, intended to waive its claim of immunity, and place itself upon a parity with other ship owners engaged in similar trade and traffic; *to take upon itself the same obligation that by law it imposes upon others in like business* * * *. Not only therefore does the express language of the act, but equally the failure to limit its terms, lead to the conclusion of an abandonment of immunity,* under the circumstances obtaining in the instant case." (Italics ours.)

In the same case, under the title of *Eastern Transportation Co.* v. *United States* (272 U. S. 675), this Court said (pp. 687, 688):

> "It is first objected to the recovery here that it was not intended by the Suits in Admiralty Act to subject the United States itself to prosecution for a *crime* which it denounces in its legislation. We need not be troubled by this objection, because there is no attempt here to prosecute the United States or any of its agents criminally. The declaration that the leaving of a wreck in a navigable channel in a place dangerous to passing steamers without notice of the danger and without immediate removal is unlawful, makes such omission a maritime tort, which, if merchant vessels of the United States are to respond in tort, may be recovered for in its admiralty courts against the United States without anomaly. *The Fahy*, 153 Fed. 866; *The Macy*, 170 Fed. 930; *People's Coal Company*, 181 Fed. 609, 188 Fed. 892. Under the Tucker Act and the general jurisdiction of the Court of Claims, of course, the United States is made liable only upon a contract express or implied, and not for a tort; *but its liability provided for in the Suits in Admiralty Act can not be limited to contracts any more than the liability of its merchant vessels under the Shipping Act of 1916 could be so limited. The Lake Monroe*, 250 U. S. 246." (Italics ours.)

Eastern Transportation Co. v. *United States*, 29 Fed. (2) 588;

United Fruit Co. v. *United States Shipping Board Merchants Fleet Corp.*, 42 Fed. (2) 222.

The Act of March 9, 1920, Chapter 93, Section 6 (46 U. S. C. 746) provides:

> "The United States or such corporations shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels."

The United States, having taken away the right of the libellant, the petitioner herein, to libel the vessel, the S. S. *American Shipper*, and having accepted all the provisions of the Suits in Admiralty Act and all the exemptions and limitations of liability provided thereunder, must also assume all liabilities that would be assumed by or imposed upon private owners.

> *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 690.

The United States has not hesitated to urge its right to limitation of liability under this Section.

> *The Moosabee*, 7 Fed. (2) 501.

In the cases of *Lynch* v. *United States and Wilner* v. *United States*, recently decided by this Court, June 4, 1934 (78 U. S. Sup. Ct. Law Edition, p. 997), suit was brought on what may be referred to as two war insurance policies. It was contended on behalf of the respondent, the United States, that Section 17 of the Economy Act repealed "all laws granting or pertaining to yearly renewal term insurance." This Court held that the United States itself could not abrogate outstanding rights. On page 1001 it is said:

> "The Fifth Amendment demands that property be not taken without just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central Pacific R. R. Co.*, 118 U. S. 235, 238; *United States* v. *Northern Pacific R. R. Co.*, 256 U. S. 51, 64, 67. When the United States enters into contract relations its rights and duties therein are governed generally by the laws applicable to contracts between private individuals."

The United States was clearly in business in competition with private concerns and was bound by its contract with the libellant McCrea, and had lost any immunity it might have had as a sovereign. Any other construction would constitute an unfair discrimination against seamen employed on merchant vessels owned by the United States and would result in taking their property without just compensation, which is prohibited by the due process clause of the Fifth Amendment to the Constitution of the United States.

In the case of *Ohio* v. *Helvering*, decided May 28, 1934 (78 U. S. Sup. Ct. Law Edition, p. 911), this Court said (p. 912):

> "Whenever a state engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vested in Congress.
>
> "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support on some authority apart from the police power.
>
> "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the government is concerned."

In *Georgia* v. *Chattanooga* (264 U. S. 472), the City of Chattanooga sought to condemn lands owned by the State of Georgia. The lands were used by Georgia for railway purposes. Georgia sought to enjoin the condemnation proceedings. It is said (p. 481):

> "The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a

> private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity. *Bank of United States* v. *Planters Bank*, 9 Wheat. 904, 907; *Bank of Kentucky* v. *Wister*, 1 Pet., 318, 323; *Louisville, C. and C. R. R.* v. *Letson*, 2 How. 497, 550; *South Carolina* v. *United States*, 199 U. S. 437, 463."

On page 482, it is said:

> "Having divested itself, (the State of Georgia), of its sovereign character, and having taken on the character of those engaged in the railroad business in Tennessee (*Bank of U. S.* v. *Planters Bank*, *supra*), its property there is as liable to condemnation as that of others, and it has, and is limited to the same remedies as are other owners of property in Tennessee."

The United States had been engaged in private business, operating vessels on the high seas as merchant vessels in competition with private owners. All merchant vessels were subject to libel, and it has been held by this Court that vessels owned by the United States, whether registered in its name or by some board or corporation in its behalf, were subject to libel, the same as that of any other operator or shipowner.

The Lake Monroe, 250 U. S. 246.

Desiring to do away with the inconvenience of having merchant vessels owned by it subject to libel, the Suits in Admiralty Act was passed in which the United States agreed and contracted that the vessels should not be libelled, but that, in place thereof, suit could be brought against the United States with the same force and effect as though against a private owner. These provisions were embraced in the contract with the sea-

men and the rights thereunder could not be abrogated by the United States itself.

> *Lynch* v. *United States*, 78 U. S. Sup. Ct., Law Ed. 997.

Yet, in the present case, *McCrea* v. *United States*, the Circuit Court of Appeals tries to do something which Congress could not do. That is, abrogate the rights McCrea had under his contract with the United States, including those rights arising from the Suits in Admiralty Act. It will be noted that in the opinions of the District Court and the Circuit Court of Appeals nothing is said about the Suits in Admiralty Act.

POINT IV.

The libellant was entitled not only to his discharge, but also to one month's wages over and above the wages due and to some provision for his transportation home, under R. S. 4583 (46 U. S. C. 685).

R. S. 4583 (Dec. 21, 1898, C. 28, Sec. 18; 30 Stat. 760; 46 U. S. C. 685) reads:

> "Section 685. Wages on justifiable complaint of seaman. Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and upon his being satisfied of the truth and justice of the complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or to provide him with a pass-

> age on board some other vessel bound to the port from which he originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman."

The libellant claimed that, by reason of the violation of Section 2 of the Act of March 4, 1915 (46 U. S. C. 673) by the respondent, the voyage was continued contrary to agreement, and also that the vessel was unseaworthy; that, by reason thereof, and by reason of the fact that he was entitled to his discharge in a foreign port, he was entitled to the relief provided for by R. S. 4583 (46 U. S. C. 685), to wit, one month's pay and provision for his transportation back to the United States.

As to the first ground for asking a discharge, the voyage was continued contrary to agreement because, by proceeding with watches unevenly divided, the ship owner breached the statute relating thereto, Sec. 2, of the Act of Mar. 4, 1915 (46 U. S. C. 673), and this statute was embraced in and had become a part of the contract between the seaman and the owner.

That the statutes in regard to seamen form a part of their contract is a recognized principle of law. It is stated in the case of *Covert* v. *British Brig Wexford* (3 Fed. 577). The seamen there claimed wages due under the British Merchant Shipping Act (17 and 18 Vict., C. 104), and additional wages during the time payment was delayed. Choate, *J.*, said (p. 579):

> "The contract with the seaman is to be deemed made with reference to the existing law governing the ship, which, in this case, is the British law, and the right to the extra pay must be deemed secured to them by the contract itself."

And again, with reference to the claim of the master of the *Wexford* to a lien, the court said (p. 509):

> "The contract with the master is made with reference to the statute, and the lien or interest

> in the vessel is thereby given to him as part of the consideration for his service. It is immaterial that the lien is not *created* by the maritime law. The admiralty courts enforce liens created by statute or by agreement, and thereby annexed to or made part of a maritime contract." (Italics ours.)

In *Cox* v. *Lykes Bros.*, (237 N. Y. 376), Mr. Justice Cardozo discussed the statute relating to two days' pay for one, while payment was delayed. Pointing out that in fairness, seamen so situated should recover more than the wages due, he said (p. 379):

> "How much this extra amount should be, would often be a troublesome question if it were left open in every case. 'Hence, it might be deemed advisable to have this indefinite element made definite by a general law, with reference to which the parties may conclusively be presumed to have contracted, and which, therefore, should be taken to be the law of the contract' (*Calvin* v. *Huntley, supra; Gerber* v. *Spencer*, 278 Fed. Rep. 887; *Covert* v. *British Brig Wexford*, 3 Fed. Rep. 577, 578, 579)."

"Contrary to agreement" means any breach of contract. If the articles and the statutes relating thereto are breached in any way by the master or the owners, the voyage is continued contrary to agreement and the seaman is entitled to ask for his discharge.

The opinion of the District Court adopted as its own a report of the Attorney-General (35 Opinions of Attorney-General, 292) which attempted to narrow any breach of agreement so as to relate only to a possible protracting of a voyage, or to prolonging it unnecessarily. This contention was based on the wording of some of the former enactments of this section, but there is no foundation for this limitation. There is no logical ground for such a restriction of meaning, even under the earlier statutes, and none at all in the present form.

As to the second ground for relief under this statute, there is no question that, when the respondent violated Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673), the vessel was rendered unseaworthy, and the libellant was given additional ground to ask for his discharge under R. S. 4583 (46 U. S. C. 685).

As was said in *O'Hara* v. *Luckenbach S. S. Co.* (269 U. S. 364, 367), by Mr. Justice Sutherland:

> "The general purpose of the Seaman's Act is not only to safeguard the welfare of the seamen as workmen, but, as set forth in the title, also 'to promote safety at sea.' • • • The ship should at all times be actively manned with equal efficiency."

And again (p. 368):

> "But the provision fundamentally is a measure of precaution against those perilous and unexpected emergencies of the sea when only immediate and wakeful readiness for action may avert disaster or determine the issue between life and death."

And it was definitely held (p. 370):

> "It is not unreasonable to conclude that Congress determined that each of the watches, like the crew as a whole, should be 'adequate in number; competent and in a state of readiness for any exigency that is likely to happen'—such as collision, a striking of the ship upon a reef of rocks or an iceberg, the sudden breaking out of fire, and other happenings of like disastrous tendency—and to this end meant to provide for successive and continuous watches to be constituted in numbers as nearly equal as the sum of the whole number would permit."

In the case of *In re Meyer* (74 Fed. 881), it is said (p. 885):

> "It is the duty of the owners of a steamer • • • to provide the vessel with a crew adequate in number and competent for their duty with reference to the exigencies of the intended route."

O'Hara v. *Luckenbach S. S. Co.*, 269 U. S. 364, 367, 368;

In Re Meyer, 74 Fed. 881, 885;
In Re Pacific Mail S. S. Co., 130 Fed. 76;
Flint & P. M. R. v. *Marine Insurance Co.*, 71 Fed. 210;
The Rolph, 293 Fed. 269;
Northern Com. Co. v. *Lindblom*, 162 Fed. 250, 254.

The consul, therefore, should have directed the libellant's discharge, and should have required the master to pay to him one month's wages over and above the wages due and to make provision for his transportation to the United States. This was not optional, but obligatory, as is more clearly seen when this section is construed with the express provisions of R. S. 4580 (June 26, 1884, C. 121, Sec. 2; 22 Stat. 54; 46 U. S. C. 682). Section 2 of that statute provides:

> "Section 4580. Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge. If it appears to such officer that said seaman has completed his shipping agreement, *or is entitled to his discharge under any act of Congress* or according to the general principles or usages of maritime law as recognized in the United States, such officer *shall* discharge such seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman; but no payment of extra wages shall be required by any consular officer upon such discharge of any seaman except as provided in this act." (Italics ours.)

Section 3 of the act, immediately following, is R. S. 4583 (46 U. S. C. 685), under which the petitioner claimed relief, which provides for a seaman discharged in a foreign port one month's wages over and above the wages due at the time of discharge, together with transportation home.

The two sections taken together show the clear intent of congress that a seaman who leaves his vessel in a foreign port, whether at his request or at the instance of the master, shall be provided with funds additional to the wages earned.

(It will be noted that the form of the statute quoted above is that of the original enactment of June 26, 1884 [C. 121, Sec. 2] and not the restatement thereof of December 4, 1925, found in Section 682 of the United States Code, which is erroneous. The original statute is, of course, the law.)

The District Court found that the libellant was not entitled to an additional month's pay and transportation home because, granting he was entitled to his discharge on account of the violation of 46 U. S. C. 673, the relief provided for by that section was exclusive. But the libellant is not asking for the extra wages under Section 2 of the Act of March 4, 1915 (46 U. S. C. 673). He is asking for them under R. S. 4583 (46 U. S. C. 685), which regulates discharge in foreign ports. If he had asked for his discharge at any port in the United States because of the unequal division of watches, discharge would have been the only relief he might have claimed. But he was in the port of London, and could claim additional wages and transportation back to the United States under the provisions of R. S. 4583 (46 U. S. C. 685).

That a seaman may have a discharge under one statute, and additional relief under another statute when discharged in a foreign port, is expressly provided by R. S. 4580 (46 U. S. C. 682). Nor does Section 2 of the Act of March 4, 1915 (46 U. S. C. 673) limit the relief therein provided, and this failure to limit its terms gives the seaman a right to the additional relief of Section 685.

The Snug Harbor, 283 Fed. 1015, 1018.

Congress has always shown special solicitude for seamen discharged in foreign ports. They may be far

from home, and unable to speak the language of the country. In the case at bar, the libellant was turned adrift in midwinter with only the clothes he stood in, and without even the small sum of wages earned. As was said in the case of *The Howick Hall*, (10 Fed. [2] 162) at page 163:

> "Sailors are the wards of the admiralty, and the courts jealously protect their rights."

The statutes for the protection of seamen are to be liberally construed. In the case of *Wilder* v. *Inter-Island Steam Navigation Co., Ltd.* (211 U. S. 239), it was said (p. 246):

> "But we are of the opinion that the statute is not to be too narrowly construed, but rather to be liberally interpreted with a view to affecting the protection intended to be extended to a class of persons whose improvidence and prodigality have led to legislative provisions in their favor, and which has made them, as Mr. Justice Story declared, 'the wards of Admiralty'. *Harden* v. *Gordon*, 2 Mason 541.
>
> "We think, too, that the section is to be construed in the light of and in connection with the other sections of the Title of which it is a part."

In *The Donna Lane* (299 Fed. 977), the court said (p. 982):

> "Congress appears to have considered a month's wages reasonably necessary, in addition to all arrears of wages, to insure the payment of his necessary shore expenses while awaiting another ship, and to have required its payment, even when the seaman was rightfully discharged upon the master's complaint."

By a series of statutes running back to the earliest enactments of the government, the relief provided for

seamen discharged abroad has been extended and enlarged, congress has shown a growing consciousness of the need for making additional allowances to men in such a situation. They should not be left destitute, to be assisted by charity till they can ship again, or make their way home. The statutes now provide a complete scheme of relief at the expense of the owner for a seaman discharged abroad under any and all conditions unless there has been neglect of duty on his part, or unless he has been incapacitated. In the latter case, and in the case of shipwricked or destitute seamen, he is cared for by a fund maintained by the federal government (R. S. 4581, 46 U. S. C. 683; R. S. 4578, 46 U. S. C. 678). The earlier form of R. S. 4581 (46 U. S. C. 683, March 3, 1873, c. 243) suggests that one of the reasons for requiring the additional month's pay was to relieve the government of the expense of caring for destitute seamen. Under that statute, a seaman discharged for misconduct was not to receive the extra wages, "Provided that relief can immediately be offered to such seaman by reshipment without expense to the United States".

If, on the complaint of a majority of the crew, an inspector reports that a ship was sent to sea unsuitably provided, by neglect or design, the seaman is entitled to his discharge and one month's wages over and above the wages then due, or else to his passage home or to employment on some other vessel (R. S. 4561, 46 U. S. C. 658). If a vessel is sold in a foreign country, the seaman is entitled to his discharge, his wages due, and his passage home or employment on some other ship (R. S. 4582, 46 U. S. C. 684). If the master requests his discharge for any other reason than neglect of duty or incapacity, the seaman is entitled to one month's extra wages or employment on another vessel (R. S. 4581, 46 U. S. C. 683). If the seaman asks his own discharge, or if the master applies for it, before it can

be made in either case, the master must pay to the consular officer the wages then due, both earned and extra (R. S. 4580, 46 U. S. C. 682). And finally, under the section herein in controversy (R. S. 4583, 46 U. S. C. 685), the seaman who complains that the voyage has been continued contrary to agreement, or that the vessel is badly provisioned, or that it is unseaworthy, or that there has been cruel treatment by the officers, is entitled to his discharge, the wages due, an additional one month's wages, and transportation home or employment on some other vessel.

It will be observed that in the last section, the word "unseaworthy" is very general. The complaint may be made by one seaman only, a majority of the crew not being required as under R. S. 4561 (46 U. S. C. 658). The vessel may be unseaworthy because of its physical condition, or because the watches are not equally divided, or because the crew is not adequate, or because of any other possible contingency.

All these sections taken together, show the clear intent of congress that a seaman shall not be left destitute in a foreign port, but shall have, not only the wages due, but also other relief, no matter for what cause he was discharged.

The Circuit Court of Appeals held that the libellant was not entitled to the relief provided by R. S. 4583 (46 U. S. C. 685) because he had not been discharged by the consul. Discharge by a consular officer, the opinion said, and consular action requiring the master to pay and provide, are conditions precedent to the application of the section (R., 149). But reference to two other statutes governing discharge in a foreign port (R. S. 4580, 46 U. S. C. 682; R. S. 4581, 46 U. S. C. 683) shows that consular action requiring the master to pay and provide, is a condition precedent to discharge. The Circuit Court of Appeals has ruled, in effect, that the words "*on* the discharge," in sentence two of R. S.

4583 (46 U. S. C. 685), are synonymous with "*after* the discharge." On the contrary, these words are synonymous with "*before* the discharge."

The requirement that payment of wages must precede discharge in a foreign port is set forth in R. S. 4580 (46 U. S. C. 682). The section reads (so far as is applicable herein):

> "Section 4580. Upon the application of • • • any seaman for his own discharge, if it appears to such officer that said seaman • • • is entitled to his discharge under any act of congress, or according to the general principles or usages of maritime law as recognized in the United States, such officer shall discharge such seaman, and require from the master of said vessel, *before discharge* shall be made, payment of the wages which shall then be due said seaman; but no payment of extra wages shall be required by any consular officer *upon such discharge* of any seaman except as provided in this act." (Italics ours.)

The first part of the one sentence comprising the statute directs that the consul shall require of the master, "*before discharge*", payment of the wages then due. The last part of the same sentence directs that no payment of extra wages shall be required "*upon such discharge*" except as provided in the act. That is, the statute used the words "*before* discharge" as synonymous with "*upon* discharge." The words "*on* the discharge" used in R. S. 4583 (46 U. S. C. 685) are not the equivalent, as the Circuit Court of Appeals has held, of "*after* the discharge," but are the equivalent of "*before* the discharge."

"Wages due," it will be noted, as used in all these sections, includes both wages earned and additional wages required by statutory provisions.

An examination of the statutes, made and provided for the discharge of seamen in foreign ports, will show that the discharge itself is made by the master of the vessel in the presence of the consul and is for the master's protection.

R. S. 4551 (46 U. S. C. 643) provides:

> "Certificate. Upon the discharge of any seaman or upon payment of his wages, the master shall sign and give him a certificate of discharge, specifying the period of his service and the time and place of his discharge in the form marked Table B in the schedule annexed to this chapter; * * *."

If the master does not give such a discharge he is subject to penalties. The official form of the certificate of discharge of a seaman by the master before a consul is annexed hereto (Appendix II, p. 72). The master certifies that the seaman "was discharged". After the master has paid the seaman his wages due and one month's additional wages and arranged for his transportation back to the United States, and has given him his discharge, the consul certifies the certificate of discharge was "given to the above named seaman in my presence". The consul then gives the master a "Certificate of Discharge of Seaman to be Attached to Crew List and Shipping Articles." That form of the certificate is hereto annexed (Appendix III, p. 73).

The "Certificate of Discharge of Seaman to be Attached to Crew List and Shipping Articles" (Appendix III, p. 73) is for the protection of the master.

R. S. 4576 (46 U. S. C. 677) provides that the master shall exhibit to the first boarding officer, at the first port in the United States at which he shall arrive on his return, a certified copy of the list of the crew he had shipped, and must also produce the persons named therein. It also provides for a heavy penalty on the master for each member of the crew he fails to produce. It then provides:

> "* * * but such penalties shall not be incurred on account of the master not producing to the first boarding officer any of the persons contained in the list who may have been *discharged in a foreign country with the consent of the consul there resid-*

ing, certified in writing, in his hand and official seal, to be produced to the collector with the other persons composing the crew; * * *"

As is pointed out in *McAvey* v. *U. S. Emergency Fleet Corp.* (15 Fed. [2] 405), discharge is actually made by the master. In that case the court said (p. 407):

> "These are questions (reasons for discharge of seamen) for the master to decide; he is the one who makes the discharge. The consul does not 'cause' a seaman to be discharged, as the declaration alleges, in a case like the present. It is evidently based upon a misunderstanding of the law. When a *master* discharges a seaman in a foreign port, in order to protect himself under Revised Statutes, Section 4576, *supra,* he must secure the consent of the consul to his action. It has been said that the consul's action is not binding on either party * * *." (Italics and matter in parentheses ours.)

It thus clearly appears that before the consul can order the discharge of a seaman he must see that the master has paid the seaman one month's additional wages and provided for his transportation back to the United States. The master having made such provisions, and having given the seaman his discharge, the consul then endorses the discharge (Appendix II, p. 72), and also gives the certificate of the discharge of the seaman to the master (Appendix III, p. 73). The discharge, however, is given by the master.

If the master should refuse to comply with the directions of the consul for the discharge of the seaman, the consul may not return to him the ship's papers, as provided for by R. S. 1718 (22 U. S. C. 88) and by R. S. 4309 (46 U. S. C. 354). The latter section provides:

> "354. Deposit of ship's papers with consul.—Every master of a vessel, belonging to citizens of the United States, who shall sail from any port of the United States, shall, on his arrival at a foreign

port, deposit his register, sea letter, and Mediterranean passport with the consul or vice consul, if any there be at such port; and it shall be the duty of such consul or vice consul, on such master or commander producing to him a clearance from the proper officer of the port where his vessel may be, to deliver to the master all of his papers, *if such master or commander has complied with the provisions of law relating to the discharge of seamen in a foreign country, and to the payment of the fees of consular officers.*" (Italics ours.)

Without these papers the ship cannot clear. Moreover, on return to its home port or any other port in the United States the master is subject to heavy penalties for every member of the crew he does not produce unless he has the consul's certificate in relation thereto.

It appears from the testimony, introduced on behalf of the respondent, that the discharge of the seaman is given by the master, and that it is approved by the consul.

The deposition of Lowell C. Pinkerton, American Consul at London, was taken and introduced in evidence on behalf of the respondent. He testifies (R., 72):

"8. Q. In a case arising in the port of London, in which is situated a branch of the American Consular Service, has the Master of an American vessel the power to discharge a seaman without your approval *i. e.*, the approval of the American Consul?

"A. The Master has no such authority.

"9. Q. What is the procedure in relation to discharging a seaman?

"A. The procedure in relation to discharge of a seaman varies dependent upon the reason for the discharge. The Statutes in some cases provide that a formal hearing shall be conducted to determine whether the claim is justified. However, usually the consular officer to whom application is made determines for himself whether such application may be approved.

"10. Q. Must the discharge of a seaman be approved by you, *i. e.*, by the American Consul?

"A. The discharge of a seaman must be approved by a consular officer when the discharge is made abroad.

"11. Q. Can the Master of a ship upon demand by a seaman to be paid off, on arrival at London, do so without referring the matter first to your office, *i. e.*, the office of the American Consular Service?

"A. No.

"Q. (a) Why?

"A. (a) Because a fine is provided if the Master fails to produce his crew upon the return to the United States but such penalty is not provided in case the Master can produce a list of those who have been discharged in a foreign country with the consent of a Consul or Vice-Consul there residing, certified under his hand and seal."

The deposition of Daniel Miller, American Vice-Consul, was taken and introduced in evidence on behalf of the respondent. He testifies (R., 81):

"8. Q. In a case arising in the Port of London, in which is situated a branch of the American Consular Service, has the Master of an American vessel the power to discharge a seaman without your approval, *i. e.*, the approval of the American Consul?

"A. No.

"9. Q. What is the procedure in relation to discharging a seaman?

"A. When application for discharge has been made, the procedure followed, depends on the circumstances. In some cases, formal hearings are provided under the Statutes. In most cases, the consular officer can decide whether or (fol. 113) not the application should be approved.

"10. Q. Must the discharge of a seaman be approved by you, *i. e.*, by the American Consul?

"A. Yes."

It further appears from the testimony of Daniel Miller that the reason for requiring the approval by an

American Consul of the discharge of a seaman is not to protect the seaman but to protect the master. He testifies (R., 81) that the master cannot lawfully discharge a seaman in a foreign country without the intervention of a consular officer for the reason that, if he should do so, he would be subject to heavy penalties because of the violation of R. S. 4576 (46 U. S. C. 677).

Both R. S. 4580 (46 U. S. C. 682) and R. S. 4581 (46 U. S. C. 683) formed part of an act entitled "An Act to regulate the Diplomatic and Consular Systems of the United States" (August 18, 1856, c. 127, sec. 26; 11 Stat. 62). Under R. S. 4580 (46 U. S. C. 682), a seaman who is entitled to his discharge under any act of congress "shall" receive it. Under R. S. 4581 (46 U. S. C. 683), a consul who does not require the master to pay the wages and extra wages directed when a seaman is discharged, is personally liable to the United States for the amount he should collect before the discharge is given. This section reads (so far as is applicable herein):

> "Section 4581. If any consular officer, when discharging any seaman, shall neglect to require the payment of and collect the arrears of wages and extra wages required to be paid in the case of discharge of any seaman, he shall be accountable to the United States for the full amount thereof. The master shall provide any seaman so discharged with employment on a vessel agreed to by the seaman, or shall provide him with one month's extra wages, if it shall be shown to the satisfaction of the consul that such seaman was not discharged for neglect of duty, incompetency, or injury incurred on the vessel. If the seaman is discharged by voluntary consent before the consul, he shall be entitled to his wages up to the time of his discharge, but not for any further period. If the seaman is discharged on account of injury or illness, incapacitating him for service, the expenses of his maintenance and return to the United States shall be paid from the

> fund for the maintenance and transportation of destitute American seamen . . . " (March 4, 1915, c. 153, sec. 19; 38 Stat. 1185).

In the case at bar, the consul arbitrarily refused to require the master to give the seaman a certificate of discharge, but he should have done so, as both the District Court and the Circuit Court of Appeals have found. The consul stated that he was not concerned with the decision of the United States Supreme Court, in the case of *O'Hara* v. *Luckenbach S. S. Co.* (*supra*). Yet the Circuit Court of Appeals has held that a seaman has no recourse when arbitrarily denied the discharge to which he is entitled.

It has been repeatedly held that, even in relation to findings of fact by a consul, his determination is not conclusive. It is *prima facie* only, and may always be opened up by the courts in a proper case.

> *Campbell* v. *The Uncle Sam*, 1 McAll. 77; Fed. Cas. No. 2372;
> *The Donna Lane*, 299 Fed. 977;
> *The T. F. Oakes*, 36 Fed. 442;
> *The W. F. Babcock*, 85 Fed. 978;
> *McAvey* v. *U. S. Emergency Fleet Corp.*, 15 Fed. (2) 405.

In the case of *Campbell* v. *The Uncle Sam* (1 McAll. 77), seamen brought an action for wages and extra wages under R. S. 4583 (46 U. S. 685). They had shipped from San Francisco to San Juan del Sur, but the master put into Panama instead. They were there discharged on their request, but without pay and over the objections of the master. When the action was brought, the respondent objected that the men were not entitled to discharge, and that the procedure of the consul had been not only illegal but fraudulent. The court held that the master had broken the contract with the men by altering the destination of the voyage, and said (p. 79):

> "• • • the seamen were entitled to their discharge according to the general principles of the law merchant, without the intervention of the consul at Panama. The acts of Congress on that subject are cumulative, made for the protection of seamen, and with a view to afford them a prompt remedy; certainly not to withdraw from them the protection of the courts. *Whatever had been the action of the consul, or the form of his certificate,* • • • *whether legal or illegal, regular or irregular,* • • • *it could not be conclusive upon this court, nor shut its door upon the libellants.*" (Italics ours.)

And again (p. 80):

> "In *Hutchinson* v. *Coombs* (Ware, 65), it is laid down that the certification as to the discharge of a seaman will not preclude the court from inquiring into the cause of his discharge, and awarding damages if his discharge was unjustifiable. Whether the law under which the consul acted be constitutional or not; whether, if constitutional, the conduct of the consul was in strict accordance with it; whether his action was honest, or, as is alleged, • • • covinous, are not the subject of inquiry. *The question is, 'Were the libellants entitled to their discharge?'* After the breach of the contract by the claimants, and the detention of the libellants, arising out of that breach, for upwards of a month at Panama, I consider them entitled to such discharge." (Italics ours.)

In the case of *The Donna Lane* (299 Fed. 977), the libellants refused to assist with the cargo on Sunday, basing their refusal on Section 2 of the Act of March 4, 1915 (46 U. S. C. 673). They were discharged in Hong Kong at the request of the master, but were not paid extra wages. The court, holding the findings of the consul were not conclusive, said (p. 982):

> "By Section 4554, R. S. (Section 8343 Comp. Stat.), the award of a shipping commissioner is conclusive upon any question between the master and any of his crew, when the question is submitted to him by both parties in writing. There is no

similar statute applicable to hearings before a consul. No reason appears in the present case, in the absence of a settlement before a shipping commissioner at the end of a voyage, to depart from the general rule; that the final adjudication as between the parties of the amount due to a person for services will be left for determination in a suit by the person claiming for services."

In the case at bar, the question of the right to discharge was not even one of fact, but of law, and the consul assumed to determine the point in contradiction to the decision of the Supreme Court of the United States. That the consul decided a question of law erroneously is no bar to the libellant's pressing his claim in the courts for additional wages and provision for his transportation, the prerequisites to the discharge to which he was also entitled.

A seaman who leaves his ship when he has a right to do so, when his contract has been broken by the master or owner, is not a deserter, though he was not discharged in the presence of a Shipping Commissioner as required by 46 U. S. C. 641, and he can bring an action in the federal courts to recover the wages due him.

O'Hara v. *Luckenbach S. S. Co.*, 269 U. S. 364;
Southern Pacific Company v. *Hair et al.*, 24 Fed. (2d) 94;
Thompson v. *Lucas*, 252 U. S. 358.

By the same reasoning, a seaman who leaves his ship in a foreign port because his contract has been broken by the master or owner, and is refused his discharge to which he had a right under an act of congress, can bring an action in the federal courts to recover the additional wages due him under the statute. The only question is, "Was he entitled to his discharge?" No act of the master or of the consul can shut the door of the courts to a seaman who was within his rights in demanding his discharge.

POINT V.

The judgment or decree, signed August 12, 1932, and entered August 15, 1932, was never vacated or set aside, and the court erred in entering the decree dated March 9, 1933.

The Court of Appeals in its opinion (R., 147) devotes considerable space to a discussion of the decree signed August 12, 1932 and entered August 15, 1932, and the decree signed March 8, 1933 and entered March 9, 1933. Although these questions do not go to the merits of the construction of the sections of the Seamen's Act, particularly U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746, and the constitutional points involved, the Court of Appeals deemed them important (R., 146, 147, 148).

The first judgment or decree in this action was signed by the District Court on *Friday*, August 12, 1932, after a hearing in relation to its form, at which time both sides were represented and the form of the decree agreed on (R., 109). *Saturday*, August 13, 1932, was a half holiday. The judgment or decree was entered *Monday*, August 15, 1932. The letter of the proctor for the respondent, requesting a rehearing in this case, is dated August 13, 1932. This was *Saturday*. A copy was sent to the proctor for the libellant but it was not received by him until *Monday*, August 15, 1932.

The Circuit Court of Appeals stated (R., 147):

> " • • • It is apparent that the entry of the decree of August 15th, two days after the request for rehearing was made, was irregular. At that time, the matter of a rehearing was pending and a rehearing without restriction was granted August 30th • • • ."

There is absolutely nothing in the record to uphold this conclusion. While it is true the letter on behalf of the respondent was dated August 13, 1932, which was a Saturday, there is nothing to show that it was

sent to or received by the court on or before Monday, August 15, or in fact, on or before August 30, (R., 130, 131).

No motion was made to vacate or modify the decree of August 15, 1932. In the opinion of the District Court, modifying the decree of August 15, 1932, the court said (R., 110):

> "By memorandum opinion, dated August 30, 1932, a reargument of this case was granted • • • . The decision previously rendered is modified • • • ."

A decision is not a decree. *G. Amsinck* v. *Springfield Grocery Co.* (7 Fed. [2] 855, 858, 859).

The case of *Hook* v. *Mercantile Trust Co. of N. Y.* (95 Fed. 41), cited by the Circuit Court of Appeals, is one where a decision had been handed down by the Court of Appeals, but it does not appear that any judgment had been entered thereunder. A motion was made by both sides for a rehearing and the motion was granted, and upon the rehearing the decision was modified.

POINT VI.

The respondent, the United States, did not plead that the relief, provided for by R. S. 4529 (46 U. S. C. 596), was a penalty, and made no motion to amend its pleadings.

On the hearing before the District Court on the motion for a reargument of the case, a point was raised by the libellant, petitioner herein, that the respondent, the United States, had not pleaded that the relief, provided for by R. S. 4529 (46 U. S. C. 596), was a penalty. Notwithstanding this, the respondent made no motion to amend its pleadings. If the contention of the respondent was correct, and the relief provided for by R. S. 4529 (46 U. S. C. 596) was a penalty, the proctor for the respondent knew, or claimed he knew, or he should have known it, at the time of the argument on the rehearing,

but he did not make any motion to amend his pleadings. The respondent admitted that jurisdiction had been obtained and that the action was for wages (R., 8). It was found by the Circuit Court of Appeals that the vessel in question, the S. S. *American Shipper*, "was owned by the United States and was a merchant vessel subject to the provisions of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673)." (R., 145.)

The respondent, not having raised in its pleadings the question that the relief provided for by R. S. 4529 (46 U. S. C. 596) was a penalty, and having made no motion to amend its pleadings, it should not have been allowed to raise that question. This point was presented to the Circuit Court of Appeals, but they did not pass upon it in any way.

In the case of *Avery* v. *United States* (12 Wall. 304), the court said (p. 306):

> "It is a familiar principle that no one can be relieved against a judgment, however unjust he may consider it, if he had a defense and, through his own fault, failed to present it * * * It would lead to endless embarrassments in the administration of justice, if a party were permitted to reopen a judgment on the ground that he had a defense that he did not present, because ignorant of it, but which, the court can see, he could have known if he had used reasonable diligence to ascertain it."

CONCLUSION.

Wherefore the petitioner prays that the decree of the United States Circuit Court of Appeals, denying the petitioner the relief provided by R. S. 4529 (46 U. S. C. 596), and the relief provided by R. S. 4583 (46 U. S. C. 685), be reversed, and that the petitioner be granted the relief provided in the said sections.

All of which is respectfully submitted.

JOHN M. SCOBLE,
Proctor for Petitioner.

K. COURTENAY JOHNSTON,
Of Counsel

APPENDIX I.

Legislative history of the Suits against United States in Admiralty Act.

I.—There are three drafts of the Suits against the United States in Admiralty Act, the second and third drafts being almost absolutely the same, with merely the slightest of changes between them, and the third draft being the present Suits in Admiralty Act as passed by the Senate and the House of Representatives without any change whatsoever.

Essentially all these drafts are the same, and the apparent differences exist chiefly between the first and second drafts. But these differences are more apparent than real, because while sentences have been shifted around from one section to another between the first two drafts, each one has practically the same content.

II.—The first draft of the Act was drawn up in the summer of 1919 by Mr. Ira A. Campbell, then Special Assistant to the Attorney General and in charge of admiralty litigation. He had previously been Admiralty Counsel of the United States Shipping Board from May 1, 1918, before he became Assistant to the Attorney General. As a result of his practical experience in these positions he drafted H. R. 7124.

At the Hearing Before the Committee on the Judiciary, House of Representatives, Sixty-sixth Congress, First Session, held August 26, 1919, he testified, according to the official report, as follows:

Pages 11-12.

> "Mr. Campbell: I will now read the bill, H. R. 7124:
>
> 'A BILL authorizing suits against the United States in admiralty, for salvage services, and providing for the release of merchant vessels

belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States, and any corporation in which the United States owns not less than a majority of the capital stock, may be sued *in personam* in the district courts of the United States in admiralty for any cause of action of which said courts ordinarily have cognizance in their admiralty and maritime jurisdictions——'

"Mr. Steele: What was your idea in using the word 'ordinarily' within the jurisdiction? Would it not be clearer if you left the word 'ordinarily' out?

Mr. Campbell: I will tell you why I used it. What I am trying to do is to place the Government in the same position in suits in the admiralty courts as the private owner is. I put that word in there to try to express and convey that particular intention * * *.

I will continue reading:

'arising since April 6, 1917, out of or in connection with the possession, operation, or ownership by the United States or such corporation of any merchant vessel, or the possession, carriage, or ownership by the United States or such corporation of any cargo in those cases where, if the United States were suable as private party, a suit *in personam* could be maintained, or where, if the vessel or cargo were privately owned and possessed, a libel *in rem* could be maintained and the vessel or cargo could be arrested or attached at the time of the commencement of suit.'

In brief, that means the United States could be sued *in personam* in any case arising out of the carriage, etc., of cargoes by Shipping Board vessels, where a private citizen could be sued."

III.—Section 1, therefore, specifically says that a pure suit *in personam can be maintained*: "The United

States * * * may be sued *in personam* * * * in those cases where, if the United States were suable as a private party, a suit *in personam* could be maintained * * * ."

This was the intention of the draftsman and the clear understanding of the Committee of the Judiciary, as shown by the following statements from the official report:

Page 14.

> "Mr. Webb: Does this section take away the right of bringing an action *in rem?*
>
> Mr. Campbell: No, sir; in the next section I cover that. This first section gives the right of action *in personam.*
>
> Mr. Webb: That is the only change in existing law that this section makes?
>
> Mr. Campbell: I could not say absolutely that there is no change in existing law, because the only law we have on the subject today is that grounded upon Section 9 of the Shipping Board Act, as interpreted from the Supreme Court decision in the *Lake Monroe* case. That says nothing about liability with respect to ownership and carriage of cargoes and the like of that. This does. But the situation is simply this, that the government has been and is engaged in commercial pursuits with vessels. It is now carrying cargoes for everyone who applies, and there is no reason why the Government, in the operation of this commercial fleet in commercial trades, should not be subject to the same liabilities as the private owner who engages in that business."

IV.—Section 1 having covered suits purely *in personam*, Section 2 was intended to cover suits nominally *in personam*, but proceeding according to the principles of suits *in rem*. This again appears clearly from the testimony at the official hearing:

Page 16.

> " 'Sec. 2. That no suit *in rem* shall be brought against nor any warrant of arrest or attachment

levied upon any vessel owned or operated by or demised to or in the possession of the United States or such aforesaid corporation, nor against nor upon any cargo owned or/and in the possession of the United States or such corporation, but any suit brought hereunder shall, if the libelant so elects in his libel, proceed in accordance with the principles of suits *in rem* in all cases wherein maritime liens exist and where, if the vessel or cargo with respect to which the action arises were privately owned and possessed, a libel (suit) *in rem* could be maintained and the vessel or cargo arrested or attached at the time of the commencement of suit; but election to proceed as aforesaid as *in rem* shall not preclude the libelant in a proper case from also seeking relief *in personam* in the same suit.'

Mr. Webb: You read 'suit' in line 15.

Mr. Campbell: 'Libel' should be changed to 'suit'. That is a slip on my part. Use the word 'suit' throughout.

Let me explain that section. It first provides that no suit *in rem* shall be brought nor any vessel of the United States, and that any cargo owned and in possession of the United States, shall not be libeled or attached, but any suit brought under this bill, and that is a suit authorized by the first section, suits *in personam*——

> 'shall, if the libelant so elects, proceed in accordance with the principles of suits *in rem*, in all cases where maritime liens exist, and where, if the vessel or cargo with respect to which the action arises were privately owned and possessed, a suit *in rem* could be maintained and the vessel or cargo arrested or attached at the time of the commencement of suit.'

That it contemplates meeting this situation. There are cases where a libelant acquires a different right *in rem* than *in personam*. I think I can state the law, if my friends will correct me. I believe the law is that if a vessel is in collision while her navigation is under the control of a compulsory

pilot, she is liable *in rem*, but that you could not hold the owner liable for an action *in personam*. Now, there may be cases, I can not state them to you at the moment, where a different ranking of liens may be given in actions *in rem* than in actions *in personam*.''

V.—As a corollary of the liability intended to be imposed upon the United States according to this draft, both *in personam* and *in rem*, which liability was intended to be co-extensive with that of any private owner, the United States was then granted the benefits of all limitations of liability accorded by law to private persons.

Page 17:

''Mr. Campbell: • • • I will read Section 3.

'Sec. 3. That the United States and such aforesaid corporation shall be entitled to the benefits of all exemption from and all limitations of liability accorded by the statutes of the United States and of the several States and Territories and by the maritime law to the owners, charterers, operators, and agents of vessels.'

In other words, I confer expressly upon the Government all the rights which private owners have with respect to the limitation of their liabilities, the plan being, or the attempt being, to place the Government in the same position as a private owner.''

VI.—The purpose of the draftsman was to cover all causes of action cognizable in admiralty.

Page 46:

''Mr. Webb: Mr. Campbell, what is the result in this bill of the United States being sued directly?

Mr. Campbell: What is the result?

Mr. Webb: Yes; in what cases would suit be brought against the United States, by name, instead of the corporation?

Mr. Campbell: *In all cases of tort and contract arising out of possession, ownership, or operation*

> *of* any *ship, any merchant vessel,* as the bill now reads, possession or ownership. (Italics ours.)
> Mr. Webb: You would sue the United States?
> Mr. Campbell: Yes, sir."

In a word, as Mr. Campbell said, and substantially this statement was repeated again and again by the proponents of the bill on the floor of Congress:

Page 14:

> "* * * the Government has been and is now engaged in commercial pursuits with vessels. It is carrying cargoes for everyone who applies, and there is no reason why the Government, in the operation of this commercial fleet in commercial trades, should not be subject to the same liabilities as the private owner who engages in that business."

For the convenience of the Court we have set forth hereinafter all the relevant extracts from the Congressional Record which, in our opinion, throw light upon the passage of the bill and serve to show what the real intent of Congress was.

The principal debate upon the bill was held in the House of Representatives, where the bill was sponsored by Mr. Volstead and supported by Mr. Husted and Mr. Walsh.

On January 17, 1920, Mr. Volstead, in introducing the bill, spoke as follows (Congressional Record, Vol. 59, Part 2, page 1680):

> "Sec. 9 of the Shipping Act made the Government of the United States liable for marine torts. Simple justice required that if the Government entered upon the business of carrying freight we ought to make the Government stand in practically the position of a private individual as to liability, so that those who might be injured by its operation could have a remedy. Under the old law the Government could not be sued. * * *"

It was recognized in Congress that the Act by its broad terms went well beyond the provisions of Section 9 of the Shipping Act of 1916 and also well beyond the doctrine of the "*Lake Monroe*", 250 U. S. 246.

Pages 1685-1686. January 17, 1920:

> "Mr. Oliver: If the gentleman's amendment is adopted by the House it will give a right of action in many cases against the Government where that right does not now exist?
>
> Mr. Husted: Oh, yes; in very many cases.
>
> Mr. Oliver: I wish to call attention to that, because in replying to the question propounded by the gentleman from Illinois (Mr. Madden), the gentleman's answer did not convey that idea. This bill carries forward the right to sue the Government much further than the *Lake Monroe* case does.
>
> Mr. Husted: Oh, very much. The *Lake Monroe* case was solely confined to merchant vessels and the merchant service.
>
> Mr. Whaley: And under charter.
>
> Mr. Husted: And under charter.
>
> Mr. Whaley: They had to be under charter. If they were in ballast the action would not lie.
>
> Mr. Husted: My amendment creates a right of action against the vessels of the United States under these four important limitations.
>
> Mr. Oliver: In other words, it gives a right of action against the Government for any act of negligence in the performance of a governmental function.
>
> Mr. Husted: Not any act of negligence, but any act of negilgence in the operation of vessels upon the high seas.
>
> Mr. Oliver: Yes.
>
> Mr. Husted: Or upon inland waters, where they meet on equal terms, citizens of the United States engaged in private shipping."

By both Mr. Volstead, Mr. Husted and Mr. Walsh, it was stated that the reason for passing the Act was that where the Government managed and operated ves-

sels which it controlled, as a business enterprise, it ought to go upon the same footing as a private individual and a private corporation, and since the Government was in competition with privately owned vessels, it ought to be put upon the same footing with them.

> "Mr. Husted: My amendment is based in reason upon the common justice of granting relief to the citizens of the United States who have been injured through the negligence or incompetent operation of public vessels of the Government of the United States.
>
> I do not think I can do better, in the discussion of the question of the moral responsibility of the Government in these cases, than to quote from a very able brief of Senator Hoar, of Massachusetts, who was chairman of a committee that investigated this question. This report of Senator Hoar has been commented upon favorably in a number of cases in the Court of Claims.
>
> > 'The Committee think that the Government of the United States is not liable for loss or damage occasioned to private citizens by reason of any imperfection in the performance of the ordinary functions of government or by reason of the acts, omissions, or negligence of its officers or agents in the discharge of such functions * * *.
> >
> > 'But we are of the opinion that there are two classes of cases where sound public policy requires the United States and all other sovereign Governments to hold themselves responsible for injuries occasioned by the negligence of their agents. One is where the Government, through its agents, manages or controls property from which it receives a benefit or profit * * *.
> >
> > 'Another class of cases where this responsibility is recognized is where the Government is using or managing property through its agents under circumstances where these agents mingle on terms of equality with the general mass of citizens, and where the security of the citizens

requires that the same obligation shall rest upon them, and that it shall be enforced by similar responsibility, as in the case of private persons."

Page 1687.

"Mr. Walsh (*in supporting the bill*): * * * with respect to merchant ships we have said in the shipping act, and we can say by this bill, that the Government is operating vessels which it owns or controls as a business enterprise, and when the Government goes into that business enterprise it ought to go upon the same footing as a private individual or a private corporation, and it ought to be subject to the same liabilities for any act of Government officials in carrying out that particular business enterprise. In carrying on the operation of these ships we are operating them in commerce, in competition with privately owned vessels and ships, and we ought to be put upon the same footing as those others; * * *."

It appears both in the hearings and in the debates in Congress that it was the intention of Congress to impose upon the Government a new liability exactly the same as that of any private shipowner. This was plainly expressed in the original draft of the Act, and the subsequent drafts depart from the first draft only by attaining greater conciseness.

APPENDIX II.

(Form No. 18—Consular)

(January, 1917)

CERTIFICATE OF DISCHARGE OF SEAMAN

American Consular Service

.....
Place and date)

Name of ship, ...
Official number, ...
Port of registry, ...
Tonnage, ...
Description of voyage or employment, ...
.....
Name of seaman, ...
Place of birth, ...
Nationality .....Age.....years.
Character, ...
Ability, ...
Capacity, ...
Date of entry, ...Date of discharge.....
Place of shipment, ...
Place of discharge, ...
Cause of discharge, ...

I CERTIFY that the above particulars are correct, and that the above-named seaman was discharged accordingly.

....
Seaman. Master

Given to the above-named seaman in my presence the day and year above written.

.....
of the United States of America.

U. S. Government Printing Office, 1927 1-124

APPENDIX III.

Form No. 17—Consular

(Corrected May, 1910)

CERTIFICATE OF DISCHARGE OF SEAMEN, TO BE ATTACHED TO CREW LIST AND SHIPPING ARTICLES

American Consular Service

.....

(Place and date)

I, the undersigned, do hereby certify that the undernamed seamen have been duly discharged at this port from the .....of..... the master of the said vessel having deposited in this office the wages and extra wages as hereinafter set opposite their names, respectively, viz:

Date of Discharge.	*Name of Seaman.*	*Amount of Wages Collected.*	*Amount of Extra Wages Collected.*	*Co... Disc...*

Given under my hand and the seal of this office the day and year above written.

.....

of the United States of America.

NOTE:—Two copies to be issued, one to be attached to the Shipping Articles and the other to the Crew List Paragraph 209, Consular Regulations.)

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(Form No. 18—Consular)

(January, 1917)

CERTIFICATE OF DISCHARGE OF SEAMAN

American Consular Service

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Place and date)

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ve-named seaman was discharged accordingly.

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man. Master

the above-named seaman in my presence the
r above written.

.....
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Date of Discharge.	*Name of Seaman.*	*Amount of Wages Collected.*	*Amount of Extra Wages Collected.*	*Cause Discha*

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 249

LIVINGSTON H. MCCREA, PETITIONER

v.

THE UNITED STATES, AS OWNER OF THE STEAMSHIP "American Shipper", Engines, Tackle, Apparatus, Etc.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The first opinion of the District Court is reported in 3 F. Supp. 184. The opinion of the District Court upon rehearing is reported in 3 F. Supp. 187. The opinion of the Circuit Court of Appeals is reported in 70 F. (2d) 632.

JURISDICTION

The judgment of the court below was entered May 7, 1934 (R. 221). The petition for a writ of certiorari was filed August 3, 1934. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States is liable under Section 3 of the Seaman's Act of 1915 for double wages during the period of delay in payment of a seaman's wages.

2. Whether the petitioner, who left the ship on which he was employed as a seaman because of the respondent's violation of Section 2 of the Seaman's Act of 1915, is entitled to one month's additional wages and other relief provided for by Revised Statutes, Section 4583.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 10–13.

STATEMENT

The District Court made no special findings of fact. The facts appearing from the opinion of the District Court (R. 142–150), supplemented as far as necessary by references to undisputed testimony, are as follows:

The petitioner was hired as a fireman on the vessel "American Shipper" on or about February 15, 1928, on a voyage from New York to London and return, at wages of sixty-five dollars a month (R. 142). At that time the United States was the owner of the "American Shipper" (R. 16–17).

When the ship arrived in London, the petitioner demanded his discharge from the vessel, the payment of the balance of wages standing to his credit, one month's additional pay, and that he be provided with adequate employment on board some other vessel back to New York (R. 142). In support of his demand the petitioner quoted the titles of Section 2 of the Seamen's Act, and Revised Statutes, Section 4583 (R. 142). The petitioner made his demand while the master was advancing money to members of the crew who were about to take shore leave (R. 148). At that time the master declined to comply with the requests of the petitioner, but asked the petitioner to meet him the next afternoon at the American Consulate (R. 148).

On the morning following the request made to the master, the petitioner presented his demand orally at the American Consulate (R. 148). The petitioner left the Consulate before the master arrived (R. 148). On the next day the petitioner departed the ship without seeing the master, although that officer testified to his presence on board each and every day the ship was in port (R. 148). On the day after his abandonment of the ship, the petitioner's written complaint was received at the Consulate, as had been requested (R. 148). A Vice-Consul thereupon wrote to the petitioner that he was not entitled to discharge (R. 148). The letter was addressed to the petitioner at the ship, the only address of which the Vice-Consul had knowledge (R. 148). Since the petitioner had already left the

vessel, he never received the letter (R. 148). The petitioner remained about three weeks in England visiting relatives by marriage (R. 29), and then returned to New York at his own expense (R. 23). The libel in this suit was filed July 11, 1928 (R. 1).

On the voyage from New York to London above mentioned, the thirteen seamen on the vessel were not as equally divided into watches as that number permitted (R. 143). Three seamen were placed on each of the three watches, and four men were used for day duty and were not on any watch (R. 143). Three oilers were not placed on any watch, but were assigned to day duty (R. 143). The firemen and water tenders were equally divided into three watches (R. 143).

When the petitioner left the ship in London, he asked the chief mate for a pass for his clothes (R. 22). The request being refused, the petitioner departed the ship without his clothes (R. 23).

The District Court originally entered a decree in favor of the petitioner in the sum of $6,456.83, with interest, representing wages due at the time the petitioner left the ship, damages for loss of clothes, and two days' pay for one from the date of the commencement of the suit to the date of the decree (R. 153–154). After rehearing the decree was modified to eliminate the double wages, and the amount of recovery was thus reduced to $132.82, with interest, including costs (R. 164–165). The Circuit Court of Appeals affirmed (R. 221).

ARGUMENT

I

The petitioner's libel in the District Court contained a claim for double wages during a period of delay in payment of wages, pursuant to Section 3 of the Seaman's Act of March 4, 1915, *infra*, p. 11. It was alleged that respondent had been guilty of a violation of Section 2 of the Act (*infra*, p. 10), by the master's alleged failure to divide the seamen and oilers into equal watches. The court below held that the double wages provision created a penalty for which the United States had not consented to be sued. We submit that that conclusion is correct. But if a writ of certiorari should be granted, the respondent will further urge that there was no violation of the statute in question, that the refusal or neglect of the master to make payment of the wages demanded was not without sufficient cause, and still further, that libellant deserted his ship.

The court below relied chiefly upon the decision of this Court in *Missouri Pacific R.R. Co.* v. *Ault*, 256 U.S. 554. In that case there was presented the question whether the United States had assumed liability to continue payment of wages to a discharged railroad employee under an Arkansas statute requiring continued payment if wages due at the time of discharge were not promptly paid. When the Government took control and possession of the railroads during the war, Congress provided

that the carriers should "be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law", and that the "lawful police regulations of the several States" should remain unimpaired. Federal Control Act of March 21, 1918, c. 25, Sections 10, 15, 40 Stat. 451, 456, 458. This Court held that the provision for payment over and above the wages due was in the nature of a punishment, and said (pp. 563–564):

> Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees.

We submit that the question presented in the *Ault* case is sufficiently close to the question in the case at bar to make the reasoning of that decision controlling. As pointed out by the court below, the penalty element is more pronounced here, where the statute calls for double wages during the period of delay. And we submit that the provisions of Section 2 of the Suits in Admiralty Act (*infra*, p. 12), allowing a libel *in personam* against the United States if a "proceeding in admiralty could be maintained" against a privately owned vessel, assumes no broader liability than the Federal Control Act involved in the *Ault* case. In this connection it is interesting to note the analogy drawn by this Court in the *Ault* case, where at page 560, speaking of

the conception of the transportation systems under the Federal Control Act, it said:

> The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. * * *

The petitioner has cited cases in which the double wages provision here involved has been considered as providing for compensation to seamen rather than imposing a penalty upon the ship owner. In none of those cases was the assumption of liability by the United States directly passed upon. In *Vincent* v. *United States*, 272 Fed. 889 (C.C.A. 9th), the United States was held liable, but there was no discussion of the question raised here. Decisions that a state court has jurisdiction of the action (*Cox* v. *Lykes Bros.*, 237 N.Y. 376), that the state statute of limitations governs (*Buckley* v. *Oceanic S.S. Co.*, 5 F. (2d) 545 (C.C.A. 9th)), or that the double wages are secured by a prior lien (*Gerber* v. *Spencer*, 278 Fed. 886 (C.C.A. 9th)), do not in our opinion control here. Other cases cited by the petitioner involved similar rulings. The distinction which we deem important was noted in *Cox* v. *Lykes Bros.*, *supra* (p. 380):

> We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer. * * *

And this Court in considering the meaning and application of the words, "master or owner who re-

fuses or neglects to make payments * * * without sufficient cause", in the statute here involved, stated in *Collie* v. *Ferguson*, 281 U.S. 52, 55–56:

> We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible.

We submit that whatever activity the Government may undertake, it does not forfeit its immunity from suit otherwise than by specific consent. Consent to be liable for the double wages penalty here involved does not clearly appear and, in accordance with the principle expounded by this Court in *Missouri Pacific R.R. Co.* v. *Ault*, *supra*, may not be assumed.

The suggestion that the failure to plead the lack of consent to be sued prevented the imposition of that defense upon rehearing in the District Court is without merit. No suit can be maintained against the United States without express authority of Congress, and lack of consent to be sued may not be waived by a Government officer. *Stanley* v. *Schwalby*, 162 U.S. 255, 269–270.

II

The petitioner sued also for one month's wages over and above the wages due him at the time he left

the ship, and return passage, under Revised Statutes, Section 4583, *infra* p. 10. This demand was denied by the District Court on the ground that the relief given under Section 2 of the Seaman's Act for a violation thereof was exclusive (R. 145–147). See 35 Op. Atty. Gen. 292. The Circuit Court of Appeals denied the claim on the ground that the circumstances shown by the petitioner were not such as to make the statute applicable (R. 220–221). We submit that either ground is clearly sufficient to dispose of the petitioner's contention.

CONCLUSION

We submit that the decision below is correct, and that there is no conflict of decisions. The petition should therefore be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

GEORGE C. SWEENEY,
Assistant Attorney General.

J. R. FILLMAN,
Attorney.

SEPTEMBER 1934.

APPENDIX

Section 4583 of the Revised Statutes as amended (U.S.C., Title 46, Sec. 685) provides:

> Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he was originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman.

The Seaman's Act of March 4, 1915, c. 153, 38 Stat. 1164, provides in part:

> SEC. 2. In all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays, or sounds exclusively, the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which shall be kept on duty successively for the perform-

ance of ordinary work incident to the sailing and management of the vessel. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor shall those shipped for deck duty be required to work in the fireroom, or vice versa; but these provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when, in the judgment of the master or other officer, the whole or any part of the crew are needed for the maneuvering of the vessel or the performance of work necessary for the safety of the vessel or her cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, and other drills. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, nine hours, inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section, the seamen shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to fishing or whaling vessels, or yachts.

(U.S.C., Title 46, Sec. 673.)

SEC. 3. The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and

in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage.

(U.S.C., Title 46, Sec. 596.)

The Suits in Admirality Act of March 9, 1920, c. 95, Sec. 2, 41 Stat. 525 (U.S.C., Title 46, Sec. 742), provides:

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the

United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 249

LIVINGSTON H. McCREA, PETITIONER

v.

THE UNITED STATES OF AMERICA, AS OWNER OF THE S.S. "American Shipper", Engines, Tackle, Apparatus, etc.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the District Court (R. 102–107) is reported in 3 F. Supp. 184. The opinion of the District Court upon rehearing (R. 110–115) is reported in 3 F. Supp. 187. The opinion of the Circuit Court of Appeals (R. 145–159) is reported in 70 F. (2d) 632.

JURISDICTION

The decree of the court below was entered May 7, 1934 (R. 150). The petition for a writ of cer-

tiorari was filed August 3, 1934, and granted October 8, 1934. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States is liable under Section 3 of the Seamen's Act of 1915 for double wages during the period of delay in payment of a seaman's wages.

2. Whether the petitioner, who left the ship on which he was employed as a seaman because of the respondent's violation of Section 2 of the Seamen's Act of 1915, is entitled to one month's additional wages and other relief provided for by Revised Statutes, Section 4583.

3. Whether the trial court erred in entering the decree of March 9, 1933, without formal order vacating former judgments or orders.

4. Whether respondent was required to plead that the penalty claimed could not be enforced against the United States.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 25–28.

STATEMENT

No special finding of fact was made by the District Court.

Petitioner was employed as a fireman on the vessel "American Shipper" on or about February

15, 1928 for a voyage New York to London and return, at a wage of $65.00 per month (R. 102).

The ship arrived in London on Sunday, February 26, 1928, and while the master was advancing money to the members of the crew who were to take shore leave, petitioner demanded his discharge with full pay, additional wages for one month, and his passage home. In support of his demands petitioner quoted the titles of Section 2 of the Seamen's Act and Section 4583 of the Revised Statutes (R. 14, 19, 31, 40, 42). Petitioner had made no complaint of any kind during the voyage, and gave no explanation of the reasons for this demand (R. 120) and the master from the title of the Act and section number of the statute did not know the basis of the claim. The master testified (R. 46):

> It was necessary for me, after I got through advancing the money to go up and look up that law, look up this title, before I realized why he demanded that money.

The master did not refuse the demand but told the petitioner he would have to see him at the American Consulate (R. 40). Petitioner was given directions as to the location of the Consulate and informed that the Captain would be there sometime the next afternoon, Monday (R. 41). The Captain went to the Consulate about two o'clock the next day (R. 41), but petitioner was not there and the Captain never saw him again (R. 42).

The record shows that petitioner appeared at the Consulate Monday morning (R. 21, 83) before the

hour of appointment with the Captain, made an oral statement to the officers of the Consulate, and was advised that he was not entitled to a discharge on his own statement. Upon petitioner making request for a written finding, the Consul required petitioner to furnish a written statement of facts (R. 95), and the Consul formally in writing the next day gave an opinion that petitioner was not entitled to a discharge (R. 97). This opinion was sent to petitioner at the ship, but as petitioner had quit the ship and left no address, the opinion was never delivered to him.

The Captain was on the ship every day while in the port of London (R. 44), but petitioner made no further demand, and did not see the Captain, though he claimed to have knocked on the Captain's door Monday night and early Tuesday morning. The petitioner quit the ship on Tuesday after asking the mate for a pass for his clothes, which the mate could not give (R. 15).

Petitioner knew that the ship was to sail on Friday, March 2nd (R. 27) but did not return to the ship after Tuesday, February 28th. He was, therefore, logged as a deserter (R. 93). He visited relatives in England for three weeks and then returned to the United States and brought this suit in July, 1928.

The certificate of inspection of the American Shipper required six able seamen and two ordinary seamen. The actual complement was eleven able seamen and two ordinary seamen. The sea-

men were not, while at sea, divided into watches as equally as that number permitted. Petitioner himself, however, was on one of the regular watches, that from 8:00 to 12:00.

The District Court on August 15, 1932, entered a decree in favor of the petitioner in the sum of $6,456.83, with interest at four percent. The amount of wages due the petitioner on that date was $28.95. The balance of the judgment was made up of the sum of $40 for loss of clothing and effects, $42.50 costs, and two days' pay for one at the rate of $4.33 per day, or $130 per month, from July 11, 1928; the net result being $111.45 actually due and $6,262.88 penalty (R. 109). On rehearing this decree was modified, eliminating the double wages, and the amount of the recovery was reduced to $132.82 with interest and costs (R. 115–116). This decree was affirmed by the Circuit Court of Appeals (R. 145).

SUMMARY OF ARGUMENT

I

The phrase of the statute "without sufficient cause" does not mean that there must be a valid legal excuse or reason for not paying wages, but that there must be conduct in some sense arbitrary or willful. The statute is not intended to penalize ships and owners where, as in this case, there was no unscrupulous intent or purpose to deal with the petitioner unjustly or unfairly. Petitioner did not

give the master reasonable time or opportunity to consider the matter. The record clearly discloses that the master acted in good faith and did not at any time refuse to make payment.

II

The statute is one of punishment; it calls for an extraordinary liability not limited to damage suffered. It so clearly carries in its spirit and purpose the idea of punishment that it must be deemed a penal statute.

III

The Suits in Admiralty Act of March 9, 1920, substituted an action *in personam* for one *in rem,* but created no new liability on the part of the United States. The United States has not consented to be sued in a case of this nature, where it is contended the United States is subject to a fine for the act of its agent or servant.

IV

Petitioner's complaint was acted upon adversely to him by the American Consul and petitioner departed the ship without cause and without leave, with intent not to return. He did not return although he knew when the ship was to sail. He therefore clearly has no claim under R. S. 4583 (U. S. C., Title 46, Sec. 685). Petitioner cannot recover under both Section 2 of the Seamen's Act and R. S. 4583.

The court below had jurisdiction to amend its decree at any time before appeal was taken, and no pleading of a jurisdictional nature is necessary.

ARGUMENT

I

THE UNITED STATES IS NOT LIABLE UNDER SECTION 3 OF THE SEAMEN'S ACT OF 1915 FOR DOUBLE WAGES DURING THE PERIOD OF DELAY IN PAYMENT OF A SEAMAN'S WAGES

A. The failure to pay petitioner was not "without sufficient cause." There was nothing arbitrary, unscrupulous, or willful in the behavior of the Captain; on the contrary, he acted in good faith

This Court, in *Collie* v. *Fergusson,* 281 U. S. 52, construing Section 4529, R. S. (now Section 3 of the Seamen's Act of March 4, 1915, *infra,* pp. 26–27) said (p. 55):

> The phrase "without sufficient cause" must be taken to embrace something more than valid defenses to the claim for wages. Otherwise, it would have added nothing to the statute. In determining what other causes are sufficient, the phrase is to be interpreted in the light of the evident purpose of the section to secure prompt payment of seamen's wages * * * and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed.
>
> The words "refuses or neglect to make payment * * * without sufficient cause"

> connote, either conduct which is in some sense arbitrary or wilful, or at least a failure not attributable to impossibility of payment.

The Circuit Court of Appeals for the Fourth Circuit in *The Velma L. Hamlin,* 40 F. (2d) 852, discusses the various decisions on this question and holds (p. 854):

> The same rule applies in all cases where the failure to pay is due to the fact that payment is withheld in good faith under a reasonable belief that same is not due. The statute was intended to penalize shipowners who, without sufficient causes, withhold the wages of seamen. It was not intended to prevent them from contesting in good faith their liability for demands made upon them or to subject them to ruinous penalties, if, upon a contest made in good faith, it should turn out that they were wrong.

In *The Easterner,* 47 F. (2d) 605, the same court held (p. 606):

> Under the decision of the Supreme Court in *Collie* v. *Fergusson* et al., 281 U. S. 52, 50 S. Ct. 189, 74 L. Ed. 696, and of this court in the *Lake Gaither,* 40 F. (2d) 31; *The Velma L. Hamlin,* 40 F. (2d) 852, and *The Corapeak,* 46 F. (2d) 262, decided January 13, 1931, the rule is well established that, in order to permit the recovery of waiting time by a seaman, refusal to pay his wages must not have been "in some reasonable degree morally justified." An examination of the record here shows no arbitrary or unjust

> action on the part of the master, but on the contrary, shows that he acted in a reasonable manner throughout. If there was any conduct that could not be justified, it is the conduct of the appellant himself and not that of the master.

In the dissenting opinion of Judge Coleman in *The Sonderborg*, 47 F. (2d) 723 (C. C. A. 4th), certiorari denied, 284 U. S. 618, it is said (p. 733):

> The statute is admittedly a harsh one, and whether or not it should be invoked is, of course, not to be determined by the amount of the penalties. But the shipowner, as well as the seamen, has rights which must be protected, and the very fact that the act is oppressive demands a very careful scrutiny of the facts in each case. The total amount of the wages withheld from the seven seamen, and to which I agree they are entitled, is approximately $400, whereas the penalties allowed by the lower court aggregate approximately $3,600—a sum nine times as great. It seems unconscionable to interpret the statute as saying, or that its framers ever intended, that such virtual confiscation should be practiced under it in a case like the present one, where the master has throughout merely endeavored to discipline members of his crew, and to conform to the immigration laws in a matter dictated by his own honest and reasonable, although erroneous convictions.

In a well-considered opinion in *The Thomas Tracy*, 24 F. (2d) 372 (C. C. A. 2d), in which cer-

tiorari was denied, 277 U. S. 595, it was held that where a master refused to pay seamen their wages under an honest misconstruction of the meaning of terms in shipping articles the penalties under Section 4529 were not recoverable. The court said (p. 374):

> The statute does not mean that the refusal to pay wages must be based upon a legal defense to the wages. It means that, although it may ultimately be determined that there is no actual legal defense to the claim for wages, nevertheless, if the owner or master had sufficient cause to withhold the wages, when demanded, beyond the time mentioned in the statute, it relieves the vessel of the imposition of the penalties.

Under the law the master had four days after demand for wages within which to pay them. In the instant case the good faith of the master is shown, and the fact that he did not finally refuse to pay the wages, by his making an appointment to meet libelant at the American Consulate. No discharge could be made otherwise. The Consular Regulations provide:

> A master cannot lawfully discharge a seaman in a foreign port without the intervention of the consular officer; and it is not material in such case that the discharge is made with the seaman's consent, or that he has misconducted himself, or is not a citizen of the United States. (Consular Regulations, libelant's Exhibit 4, R. 98.)

In the instant case there seems to be no dispute as to the facts and it stands out as a guiding light that libelant was sort of a sea lawyer, that he knew the law with reference to the division of watches, that while, in the light of a decision rendered shortly before this transaction but not promulgated in Great Britain, there may have been a technical violation of the statute with reference to equal division of watches, yet this seaman participated throughout the voyage without complaint or objection, concededly having knowledge of the law and its alleged violation, and immediately set out on a program of recovering extra moneys. Waiting until his ship arrived in London, he demanded his discharge and additional pay and to be provided adequate employment on another vessel back to New York and quoted by section number and title the law involved in this case. He made his demand while the master was advancing money to members of the crew who were about to take shore leave. The master did not recognize the law referred to by section number and title and said he would have to look it up. He declined at the moment to pay libelant more than half the wages due but asked libelant to meet him the next afternoon at the American Consulate to "thrash this thing out" (R. 19). Instead of meeting the master, libelant the next morning made oral demand of the Consulate in the absence of the master and left the Consulate before the master arrived. The next

day libelant departed the ship without seeing the master although the master was on the ship every day it was in port (R. 44). Libelant made no further appearance or claim but remained visiting relatives, in England for about three weeks and then several months later in New York filed this suit without previously making any further request or demand for payment. It is clear that in the opinion of the master there was a real reason to discuss the matter with the libelant in that the question of the division of watches, as now claimed, was based upon the number of seamen on the vessel. The facts with reference to this are that more seamen were carried than the law required and it was the opinion of the master that the division of watches was properly fixed upon the basis of the legal requirement and therefore there was no violation of the statute.

A few days previously one of the Federal courts had held to the contrary in a case where the complaining seamen were not placed on any watch, but naturally the opinion could not have been known by the master at that time. It is apparent that there was an honest belief on the part of the master that there was a question to be considered. Undoubtedly his action was not arbitrary or capricious or with intent to humiliate. On the other hand, if the libelant had been acting in good faith, had kept his appointment, or had again seen the master and discussed the matter with him, the de-

lay might not have occurred. Libelant's bringing suit several months later without further request indicates clearly a desire to profit by the enforcement of the penalty. These facts, taken into consideration with the unconscionable result that six or seven thousand dollars are now demanded "as wages", when the original wage due was $28.95 (R. 109), constitute elements to be given equitable and moral consideration (as held by this Court) in determining whether or not the refusal was "without sufficient cause." Upon them the Circuit Court of Appeals held "One of his [petitioner's] reasons for becoming a member of the crew of this ship was to take advantage of any violation of the law" (R. 145). We submit that upon these considerations this penalty, exaction or compensation, whichever it may be termed, should not be allowed.

B. The statute assessing double wages is punitive in character and therefore not enforceable against the United States

Statutes imposing penalties are not applicable to the United States unless it clearly appears that Congress intended the penalty to be enforced against the United States and has granted permission for suit to be brought against them. This is because unless such intention is clearly and unequivocally expressed it cannot be held that Congress intended to compensate any person damaged through a violation of a statute by the agents or servants of the United States by punishing the

United States therefor and taking money from the United States Treasury. *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554, 563. It therefore becomes at once important to determine whether the nature of this statute is penal or purely compensatory. It is not the use of particular words which determines the nature of a statute. As said by Mr. Justice Sutherland in *United States* v. *La Franca,* 282 U. S. 568, 572, in differentiating a tax and a penalty, "a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words [tax and penalty] are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." So in the statute at bar, the expression that the "sum shall be recoverable as wages" cannot convert into compensation the penalty of double wages for "refusal or neglect" to pay. Neither the word "compensation" nor the word "penalty" appear in this statute.

In *O'Sullivan* v. *Felix,* 233 U. S. 318, 324, this Court said:

> The term "penalty" involves the idea of punishment for the infraction of the law, and is commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered.

The statute clearly conveys in its essence, spirit and purpose the idea of punishment and it therefore must be deemed to be a penal statute. However the money exacted be designated—wages, compensation or damages—the result and effect of enforcement remain a punishment and penalization of the violator of the statute.

In the last analysis, the assessment of the additional sum in this case would be a fine upon the United States for the wrongful act of an agent of the United States. It can have no other real effect.

In *Cox* v. *Lykes Brothers,* 237 N. Y. 376, Mr. Justice Cardozo writing the opinion, it was held that in a case arising before the passage of the Merchant Marine Act of June 5, 1920 the State courts had jurisdiction of an action arising under Section 4529. The question of penalty was considered in connection with the jurisdictional question. The opinion in part is based upon that in *Calvin* v. *Huntley,* 178 Mass. 29, 32, which interpreted Section 4527 of the United States Revised Statutes which contains language different from that used in Section 4529. The opinion by the Massachusetts court stresses the wording of the statute, for the court says (p. 32): "It speaks not of punishment but of compensation". The statute uses this language:

> * * * and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, *re-*

> *cover such compensation* as if it were wages duly earned. [Italics supplied.]

It is to be noted that Section 4529 involved in the instant case contains no such language and a fair implication is that the elimination of the words "recover such compensation" indicates an intent of Congress that "compensation" be not considered in the construction of Section 4529, and the reference is solely to the manner of collection, namely, "as wages are recoverable."

In the *Lykes Brothers* case the court did not have before it for consideration the question as to whether a statute of this character, which is referred to as making an "exaction", could be enforced against the United States. The court there was dealing with an Act which "contemplated a corporation in which private persons might be stockholders" and held that such a corporation, although all the stock in fact was held by the United States, was engaged in private business. The situation is entirely different under the Merchant Marine Act under consideration here. The title to all ships formerly held by the United States Shipping Board Emergency Fleet Corporation, considered by the New York court, is vested in the United States by the Merchant Marine Act of June 5, 1920. The holding of stock by private individuals is eliminated. Section 1 declares the policy and purpose of the Act:

> *Purpose and policy of United States.* It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, * * *.

This obviously constituted the Shipping Board, created under the Merchant Marine Act, a governmental agency and it is directly so held in *The Coldwater,* 283 Fed. 146 (S. Fla.), where the court says (p. 148):

> From this declaration [Section 1 of the Act above quoted] it is apparent that the United States, in the maintenance and operation of the merchant marine, is not engaged in a purely commercial enterprise, but that, on the contrary, Congress conceived that the establishment and operation of the merchant marine was the exercise of a governmental function of the highest importance, * * *.

In 1928, six years after the foregoing decision was rendered, Congress, in the Merchant Marine Act of May 22, 1928 (45 Stat. 689), expressly confirmed the declaration of policy of Section 1 of the Act of June 5, 1920 (41 Stat. 988).

C. The purpose of the Act of March 9, 1920, was to substitute an action in personam instead of in rem but it created no new liability nor does it grant consent for suits against the United States for the recovery of punitive damages

Petitioner in his brief states that it is "peculiar" that neither the District Court nor the Circuit Court of Appeals referred to the fact, as petitioner alleges, that the United States in enacting the Suits in Admiralty Act of March 9, 1920, 46 U. S. C. 741, 742, 746, divested itself of all sovereign character and waived immunity. It seems to us obvious that the reason neither of these courts referred to this matter is the fact that the holding of these courts that no penalty could be assessed against the United States of itself is a holding that the United States had not waived any immunity against penalties and had not consented to be sued therefor. The cases cited by petitioner are those dealing with the United States Shipping Board Emergency Fleet Corporation which was the corporation dealt with in the opinion by Mr. Justice Cardozo in *Cox* v. *Lykes Brothers, supra.*

The Suits in Admiralty Act abolished arrest or seizure of vessels or cargo owned by the United States and provided (§ 742):

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action

> herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation.

No suit may be maintained against the United States without express consent. A suit for a penalty is of a different nature or character from the liability spoken of by this statute. Nowhere in the statute is there any consent given to permit suit to recover an exaction or penalty from the United States for failure to perform a duty by an officer or agent of the United States. Ordinarily interest and costs are not recoverable against the United States but the Suits in Admiralty Act provides that interest and costs may be recovered against them. Specific consent is thus given. If it were contemplated that penalties could be recovered and that consent be given to such recovery, Congress would have included in the statute a provision therefor similar to the provision for interest and costs. The principle is laid down by this Court in *Missouri Pacific R. R. Co.* v. *Ault*, *supra*, that the United States may not be sued in damages for the fault of an agent or servant and thus be fined unless consent be given expressly by statute. It is well settled that when the United States has given its consent to be sued the liability assumed is not to be extended beyond that clearly indicated by Congress.

Dupont de Nemours & Co. v. *Davis*, 264 U. S. 456, 462; *Davis* v. *O'Hara*, 266 U. S. 314, 317; *Missouri Pacific R. R. Co.* v. *Ault, supra; Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 689.

A clear expression of this rule appears in the opinion of the Circuit Court of Appeals for the Second Circuit in *The Insonomia*, 285 Fed. 516, in which it was held that an act permitting a suit to be brought against the United States must be strictly construed, since the courts are confined to the letter of the statute which expresses the consent, and all its provisions are jurisdictional.

In the case of *Corrigan* v. *United States*, 298 Fed. 610 (S. D. N. Y.), this concise statement is made (p. 614):

> Neither the suits in Admiralty Act (Comp. St. Ann. Supp. 1923, §§ 1251¼–1251¼ 1) nor the Shipping Act of 1916 (Comp. St. §§ 8146a–8146r) contains any provisions whereby the United States is made liable for penalties.

Petitioner in his brief directs attention to an Act to amend Section 5 of the Suits in Admiralty Act pending before Congress in 1932 (Petitioner's brief, pp. 35–37). It is contended that the report of the Senate Committee on Judiciary (No. 771, 72d Cong.) and the report of the House of Repre-

sentatives (No. 1012, 72d Cong.) disclose there was intended an express waiver of immunity by the United States. The reports do not so disclose. On the contrary a reading of the full reports clearly establishes that the recognized object and purpose of the legislative Acts in question were merely to change the form of the remedy, and nowhere is there to be gathered any intent that there was any addition of any new liability or any consent to be sued thereon.

In the Senate Report (No. 771, 72d Cong.) referred to it is said:

> The main purpose of the suits in admiralty act was to prevent the further seizure of United States merchant vessels for such acts as made the ordinary commercial vessel subject to seizure, and to free the United States from the embarrassment of having to put up bonds for their release after seizure. In short, it substituted a remedy in personam against the United States in place of the preexisting right in rem.

In connection with this question there is also appended to the brief of petitioner a legislative history of the suits against the United States under the Suits in Admiralty Act. It is not believed that testimony before a committee of witnesses giving their theories and opinions as to what the purposes and objects of an Act should be, is competent or material.

II

THE AMERICAN CONSUL WAS NOT "SATISFIED OF THE TRUTH AND JUSTICE OF SUCH [PETITIONER'S] COMPLAINT" AND THEREFORE PETITIONER DOES NOT COME WITHIN THE PURVIEW OF SECTION 4583 R. S. PETITIONER CANNOT RECOVER UNDER BOTH SECTION 2 OF THE SEAMEN'S ACT AND R. S. 4583

Claim is made by libelant to one month's wages over and above the wages due and the cost of his transportation home, under R. S. 4583. Respondent confesses its inability to see any application of this section to the facts in the instant case. The statute provides that upon the discharge of a seaman in a foreign country by a consular officer it shall be the duty of that officer, upon being satisfied of the truth and justness of the seaman's complaint, to require the payment of wages and transportation home. In the instant case the consular officer did not discharge libelant but on the contrary found as a fact that libelant was not entitled to a discharge upon his own statement. It was not possible therefore for the master to treat the libelant as anything other than a deserter which we maintain he was both in fact and in law, as was held by the Court of Appeals in this case. Petitioner cannot recover under both Section 2 of the Seamen's Act and R. S. 4583. That these two statutes are not *in pari materia* and the provisions of Sec. 4583 are not applicable in cases of complaint

by seamen of violation of Section 2 of the Seamen's Act is held in an opinion of the Attorney General in which the history of the two enactments and all amendments thereto are exhaustively discussed. 35 Ops. A. G. 292, 297.

III

SINCE THE COURT HAD JURISDICTION OF THE CASE ON MARCH 9, 1933, THE ENTRY OF THE FINAL DECREE ON THAT DATE AFTER THE REHEARING ORDERED ON AUGUST 30 VACATED THE DECREE ENTERED ON AUGUST 15, 1932

Libelant's contention that the decree of August 15, 1932, entered obviously through error after request by respondent for a rehearing, was not set aside by the court's order on August 30 for a rehearing and the entry of final decree on March 9, 1933, is obviously without merit. The court had jurisdiction of the case at all times until the order was made allowing an appeal on May 16, 1933, and the entry of the final decree on March 9, 1933, unquestionably vacated any and all former decrees in the case. The former orders and decrees must be held to have been merged in or set aside by the final decree of March 9, 1933, which was the last and final expression of the court upon the questions at issue, and is the decree appealed from by libelant.

IV

THE QUESTION OF THE CONSENT OF THE UNITED STATES HAVING BEEN GIVEN TO BE SUED FOR PUNITIVE DAMAGES BEING JURISDICTIONAL NO PLEADING IN THAT REGARD WAS NECESSARY

The right of the court to entertain a suit against the United States is a question of jurisdiction. It is elementary law that jurisdictional questions can be raised at any time and no pleading is necessary as a basis for so doing.

CONCLUSION

We respectfully submit that the judgment of the court below was correct and should be affirmed.

J. CRAWFORD BIGGS,
Solicitor General.
HARRY W. BLAIR,
Assistant Attorney General.
GEORGE C. SWEENEY,
Assistant Attorney General.
AUBREY LAWRENCE,
Special Assistant to the Attorney General.

DECEMBER 1934.

APPENDIX

Section 4583 of the Revised Statutes as amended (U. S. C., Title 46, Sec. 685) provides:

> Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he was originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman.

The Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1164 (U. S. C., Title 46, Secs. 673 and 596), provides in part:

> SEC. 2. That in all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays, or sounds exclusively, the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water

tenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor shall those shipped for deck duty be required to work in the fireroom, or vice versa; but these provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when, in the judgment of the master or other officer, the whole or any part of the crew are needed for the maneuvering of the vessel or the performance of work necessary for the safety of the vessel or her cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, and other drills. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, nine hours, inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section the seamen shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to fishing or whaling vessels, or yachts.

SEC. 3. That section forty-five hundred and twenty-nine of the Revised Statutes of the United States be, and is hereby, amended to read as follows:

SEC. 4529. The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage.

The Suits in Admiralty Act of March 9, 1920, c. 95, Sec. 2, 41 Stat. 525 (U. S. C., Title 46, Sec. 742), provides:

> That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be,

provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

FILE COPY

JAN 30 1935

IN THE

Supreme Court of the United States

No. 249

OCTOBER TERM, 1934

LIVINGSTON H. McCREA,

Petitioner,

AGAINST

UNITED STATES OF AMERICA, as owner of the *S.S. American Shipper*, Engines, Tackles, Apparatus, Etc.,

Respondent.

PETITION FOR REHEARING.

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Supreme Court of the United States

No. 249—October Term, 1934.

Livingston H. McCrea,
Petitioner,

vs.

The United States of America, as owner of the *S.S. "American Shipper"*, Engines, Tackle, Apparatus, Etc.

PETITION FOR REHEARING.

Comes now the above named petitioner and presents this his petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

There Was No Reasonable Cause for the Refusal to Pay the Wages Earned.

The record shows the petitioner remained on the *S.S. American Shipper* for four days after he made his demand for discharge and payment of wages earned, and the master knew or should have known he was there.

Two questions as to the construction of statutes relating to seamen were presented in this appeal. The first was whether the provision, contained in R. S. 4529 (46 U.S.C. 596), for the recovery of double wages by a seaman whose demand for wages earned has been refused, is compensatory or is the imposition of a penalty; and whether, if a penalty, an action may be maintained by him

against the United States. It is in regard to this issue only that a rehearing is requested.

In its decision, handed down in this cause on January 7, 1935, the court did not go into the merits of the questions presented under R. S. 4529 (46 U.S.C. 596) as to whether or not the relief provided for by said section was compensation or wages, or a penalty; or whether, if a penalty, the respondent waived its sovereign immunity by going into business in competition with private owners or by the Suits in Admiralty Act.

In its decision the court took the position that there was no evidence in the record to show when the cargo of the *S.S. American Shipper* was discharged; or to show that the petitioner remained on board the vessel for four days after his demand for wages earned; or that he left his address with the master or made any effort to get in touch with the master during the four-day period; or that the petitioner made any effort to show to the master that he persisted in his demand for discharge and payment of the wages earned.

In its opinion, the court said (p. 5):

> "Since it does not appear in the present case when the cargo was discharged, the time within which the master could pay the wages due and thus avoid liability for double wages cannot be taken to be less than four days from the time of arrival."

The court said further (p. 6):

> "In the circumstances, he did not unreasonably defer action by fixing the following day and the Consul's office as the time and place for his decision. The failure of petitioner to keep the appointment and to communicate with the master again, after rejection by the Consul of petitioner's demand, left the master uninformed whether or not petitioner still persisted in his demand. His departure from the vessel *on the following day, without leaving an address,* precluded payment of the wages due within the four days which the statute allowed." (Italics ours.)

R. S. 4529 (46 U.S.C. 596) provides (so far as is applicable herein):

> "The master or owner of any vessel * * * shall pay to every seaman his wages * * * in case of vessels making foreign voyages, * * * within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens * * *."

Apparently the decision of the court is based solely upon the fact that it believed the seaman left the vessel on February 28, two days after making his demand, and did not return, or leave any address. This is not correct.

It Is Respectfully Submitted That There Has Been Some Misapprehension of the Record.

The testimony presented by the respondent, as well as that introduced by the petitioner, shows that the petitioner was on board the *S.S. American Shipper,* and that the master or other officers knew he was there, for a period of four days after his discharge and his demand for his wages earned was made, namely, from February 26 until March 1, and that they knew he was persisting in his demand.

The court will take judicial notice that 1928 was a leap year. The dates involved are as follows:

February	26	1928	—Sunday
"	27	"	—Monday
"	28	"	—Tuesday
"	29	"	—Wednesday
March	1	"	—Thursday
"	2	"	—Friday

It appears from all the testimony adduced by both sides that the *S.S. American Shipper* arrived at the Port of London, England, and that the petitioner demanded his discharge and wages earned and also one month's additional pay and transportation back to the United States,

on Sunday morning, February 26, 1928 (R., 14, 15, 34, 40, 41, 93).

The respondent's own witness, Captain Cummings, testified that at the time the transactions involved herein took place he made a record in the ship's log of what had happened. He stated:

> "Q. Upon returning to New York, did you file the report of the *McCrea* case with any department or official here?"
>
> "A. I made the usual log book entry in the Official Log Book, and reported down to the Customs House and to the United States Shipping Commissioner."
>
> "Q. Does that report contain the names of the crew?"
>
> "A. Merely incidental to the *McCrea* case. It contains nothing else; no other reference" (R., 51).

The entry in the log book in relation to this matter was admitted in evidence as Respondent's Exhibit A over the objection of the proctor for the petitioner (R., 34). The trial judge said, however:

> "The Court: I will take it simply as a *contemporary* entry in the official record of the ship of the *captain's version* of this transaction." (R., 34, italics ours.)

The entry in the log book was marked "Respondent's Exhibit A" and appears on page 93 of the record as follows:

> "McCrea, Livingston H., Fireman #44. For being absent from ship and duty without proper permission on Feb. 28th, and though aboard ship from 3:20 P. M. Feb. 29th to 9:00 A. M. March 1st, 1928 he failed to turn to on those days. Failed to join ship at time of sailing from London and therefore declared a Deserter March 1st having last been seen aboard ship at 9:00 A. M. March 1st, 1928. Total lost time three (3) days. Logged and fined (six) days' pay. $13.00.
>
> (Signed) SCHUYLER F. CUMMINGS, Master (Signed)
>
> W. SWARTRIDGE, Ch. Engineer."

It thus appears from the official log book entry, made by the master at the time of the occurrences herein involved, that the petitioner was on board the ship on and between February 26 and March 1; that he was charged with having failed to turn to on February 28, 29 and March 1; and that he was declared a deserter on March 1, *having been seen* aboard ship on that day. It also appears that he was fined six days' pay for refusing to turn to on February 28 and 29 and March 1, although he was aboard ship during those days; and that the master and other officers of the vessel knew he was there, and fined him for a full day March 1.

By his continued refusal to turn to, the petitioner evinced his persistence in his demand for his formal discharge and for his wages earned as of February 26, the date of his demand. By his remaining on board the vessel for four days after his demand, he gave the master any necessary opportunity to pay him the wages due within the time allowed the master under the statute.

Although in the log book entry the petitioner was charged with being absent from ship and duty "without proper permission" on February 23, his own testimony shows that he was on the vessel on that day, and tried to find the master (R., 15), looking all over the ship (R., 26).

The record shows that the master cleared his ship and sailed March 2 (R., 43, 44, 87). The master states that he made his report of desertion in relation to this matter when he returned to the Port of New York (R., 43, 51).

When the petitioner demanded his discharge and wages earned the master said he would not discharge him (R., 15). The District Court found that at that time the master declined to comply with the petitioner's request (R., 106).

There is no evidence in the record that the master ever took up the question of the petitioner's discharge with the consul, or attempted to ascertain the law. The only inquiry of the master, at the consulate on February 27, was whether McCrea had been there (R., 42). There

is no evidence that the master ever determined to pay the wages earned. In fact, the evidence of the respondent shows that, although it was known to the master or officers of the vessel that the petitioner was on the vessel for four days after his demand for his wages, the master made no effort to see him, neglected to pay him, and the petitioner was ordered to turn to as one of the crew and was fined six days' pay for not doing so (Respondent's Exhibit A, R., 93).

On March 2, the master accepted a letter from the vice-consul, to be delivered to the petitioner on board the *S.S. American Shipper* (R., 84).

As is shown by the record, the petitioner understood and believed that he was to meet the master at the office of the consul on the morning of February 27 (R., 15, 19). It is also shown that he did go to the consulate on that morning, and waited there several hours (R., 15, 21, 22). While at the consul's office, he was told by the consul that he could not see Captain Cummings (R., 22, 23). It would appear from the testimony of the respondent's witness, the vice-consul, Daniel Miller, that, at the time the petitioner was in the office, Captain Cummings was there, "about an hour before McCrea had left" (R., 87). The only testimony of the respondent's witness, Lowell C. Pinkerton, American Consul, was (R., 74):

> "Q. Was Captain Cummings present at any time when McCrea was at your office?"
>
> "A. I did not see Captain Cummings at any time while I was talking to McCrea."

The master himself testified that he had told the petitioner he would be at the consulate "some time not long after noon" (R., 41). He claims that he did not reach there until 2 o'clock (R., 41).

While at the consulate, the petitioner was requested to present a statement in writing of his charges, which he did (R., 23, 84, Respondent's Exhibit B, attached to depo-

sitions of the consul and vice-consul, Pinkerton and Miller, R., 96, 95). The petitioner returned to his ship, and prepared and sent a written statement of his complaint from the ship on February 29. Exhibit B shows that the statement requested was written February 29, 1928, and that the seaman's address was still "'*S.S. American Shipper'*, Surrey Docks, London, England" (R., 96). The petitioner was anxious to receive a written statement from the consul (R., 23), which he had been promised would be sent him when he had made his own statement in writing (R., 23, 74). As is shown by the evidence submitted by the respondent (Respondent's Exhibit A, R., 93, and Respondent's Exhibit B, attached to depositions of Pinkerton and Miller, R., 96), he remained on board the *S.S. American Shipper,* and gave that as his address where a reply might be received up to March 1. He made strenuous efforts to see the captain on board ship (R., 15, 16, 26). The written statement of the petitioner was received at the consulate February 29 (R., 84), and a written reply was prepared March 1 (R., 84).

The opinion of the court that the petitioner did not remain on board the vessel for four days after he made his demand, may be predicated upon the statement in the opinion of the District Court that the petitioner departed the ship, without seeing the master, the day after presenting his oral demand at the office of the American Consul, and that the day after he abandoned the ship his written complaint was received at the consulate (R., 106). This statement in the decision of the District Court is not correct, and is not based on the facts shown in the record. On the trial, the petitioner was testifying to facts which had taken place about four years before. While the petitioner, in answer to the question on cross-examination, "When did you leave the ship?" testified "I think it was February 28" (R., 21), and further in answer to a question by the District Attorney, "That was on Tuesday, wasn't it?" testified, "Monday or Tuesday, I forget," it appears from the records made by the master, at the time of the occur-

rences referred to, that the petitioner was on board the *S.S. American Shipper* up to and including March 1. The trial court received the ship's log as a *contemporary* record (R., 34). The ship's log (Respondent's Exhibit A, R., 93) is an admission by the respondent that the petitioner was on board the *S.S. American Shipper* up to and including March 1, and was fined six days' pay for refusing to turn to on February 28, 29 and March 1. Furthermore, the written statement sent by the petitioner to the American Consul on February 29, showed he was at that time on the vessel, and gave it as his address.

Assignments of error were taken to the statement or finding contained in the decision of the District Court that the petitioner did not remain on board the *S.S. American Shipper,* and could not have been paid by the master within four days after the demand was made (R., 121, Assignments of Error, 19, 20, 21, 22; R., 137-138, Assignments of Error, 19, 20, 21, 22).

The further holding of the District Court that double pay for wages withheld should run from the time of the petitioner's making a second demand for wages when this action was begun, seemed conclusive as to the petitioner's right to come in under the statute. The only question raised by the respondent, as to this finding of the court, was that the relief afforded was a penalty and could not be recovered against the United States. In its opinion the District Court stated (R., 107):

> "Consequently, assuming that within the statute libellant may be deemed to have received his discharge on the day upon which he demanded it, the captain still had four days within which to make payment."

The petitioner was discharged by operation of law and not by any act of the master. *The time for payment only* was delayed for four days. The respondent raised no question as to "reasonable cause", filed no assignments of

error, and took no appeal. In the opinion of the Circuit Court of Appeals it is said (R., 148):

> "The decision of the District Court that the appellant was not entitled to any double pay was put on the ground that such requirement of the statute was a penalty and not recoverable from the United States."

The question of the exact date when the petitioner left the vessel was not raised either in the brief submitted by the respondent in the Circuit Court of Appeals or in this court, or in the argument in either court. The facts above submitted were not, therefore, called to the attention of this court.

In the cases of *O'Hara* v. *Luckenbach S.S. Co.* (269 U. S. 364; 1 Fed. [2] 923), *Southern Pacific Co.* v. *Ha r et al* (24 Fed. [2] 94), *El Ostero* (14 Fed. [2] 349), *Strathearn S.S. Co.* v. *Dillon* (256 Fed. 631; 252 U. S. 348), *Thompson* v. *Lucas* (252 U. S. 358), the seamen left the vessel as soon as their demand for their wages had been refused, and began suit. Yet it was held that they were entitled to recover.

It further appears from the record that the petitioner was on board the *S.S. American Shipper* more than twenty-four hours after the cargo had been discharged, and that the master or other officers knew he was there. As appears from Respondent's Exhibit A (R., 93), the petitioner was on board the vessel March 1. The master testified that he cleared his ship on Friday morning, March 2 (R., 44, 43, 87). To clear his ship the master must have discharged his cargo and taken on a new cargo. The ship had been in port since Sunday, February 26. It thus appears that the cargo must have been discharged at least twenty-four hours before the petitioner left the vessel.

It is therefore respectfully submitted that the petition for a rehearing be granted and that, upon further consideration of the case, the petitioner be given the

relief requested in the original petition, for the reason that the court overlooked or misapprehended the facts shown by the record; that the decision of the court in relation to this matter was predicated upon facts which are erroneous; and that it appears from the record that the captain or other officers knew the petitioner was on the vessel for at least four days after his demand was made, and had opportunity to make payment of the wages.

The issues involved herein are of great importance to all seamen and must eventually be determined by this court. The decisions in the lower courts, as to whether the relief provided by R. S. 4529 (46 U.S.C. 596) is compensatory or a penalty, or, if a penalty, whether waived by the United States going into commercial business in competition with others or by virtue of the Suits in Admiralty Act, are conflicting, and should be determined by this court. These issues have been passed upon by the lower courts in this case, but their decisions are in conflict with those of other courts. The arguments upon these issues have been fully presented to this court both on behalf of the petitioner and on behalf of the respondent. The petitioner's contentions in relation thereto are found in "Brief of Petitioner", submitted on the argument, especially Point I (pp. 12-17), Point II (pp. 17-32), and Point III (pp. 32-42).

Conclusion.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted; that, upon the granting of the petition for rehearing, and upon the reargument of the case, the decree herein be modified to hold that the refusal to pay the wages of the petitioner was without sufficient cause; that a decision be rendered upon the questions whether or not the relief provided by R. S. 4529 (46 U.S.C. 596) is wages or compensation, or a penalty, and whether, if a penalty, the respondent, the United States, waived any sovereign immunity it had by

going into commercial business in competition with others or by virtue of the Suits in Admiralty Act of March 9, 1920, Chap. 9, Secs. 1, 2, 6 (46 U.S.C. 741, 742, 746); and that the petitioner have judgment accordingly, and such other and further relief as he may be entitled to receive.

JOHN M. SCOBLE,
Proctor for Petitioner.

K. COURTENAY JOHNSTON,
Of Counsel.

I, JOHN M. SCOBLE, Proctor for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

JOHN M. SCOBLE.

SUPREME COURT OF THE UNITED STATES.

No. 249.—October Term, 1934.

Livingston H. McCrea, Petitioner, *vs.* The United States of America, as Owner of the S. S. "American Shipper", Engines, Tackle, Apparatus, Etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 7, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

This is a suit under the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525, §§ 1, 2 and 6, 46 U. S. C., §§ 741, 742, 746, against the United States as owner and operator of the S. S. American Shipper, brought in the district court for southern New York by petitioner, a seaman, to recover for loss of his clothing, for wages, and for one month's additional wages and other relief provided by R. S. § 4583, because of the failure of respondent to divide the firemen and other employees of the vessel into three equal watches, as required by § 2 of the Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1164, 46 U. S. C., § 673. He also demanded, under R. S. § 4529, as amended by § 3 of the Seamen's Act, double wages, aggregating about $7,000, for failure to pay wages earned in 1928.

The district court at first gave a decree for the value of the clothing, $28.95 for the wages due, and a part of the double wages demanded. 3 F. Supp. 184. On reargument it reduced the amount of the recovery to the value of the clothing and the amount of wages due, on the ground that the demand for double wages was for a penalty for which the United States, as sovereign, is not liable. 3 F. Supp. 187. The Court of Appeals for the Second Circuit took the same view and affirmed the decree. 70 F. Supp. (2d) 632.

Certiorari was granted, — U. S. —, upon a petition which urged that the decision below was erroneous because: (a) the provision

for the recovery of double wages is compensatory and not for the imposition of a penalty; and (b), even though a penalty, it is one for which the government is liable by virtue of the provisions of the Suits in Admiralty Act and of the government's waiver of sovereign immunity by engaging in the business of operating vessels in competition with private owners. It is also insisted that the Court of Appeals erred in holding that the decree first entered by the district court, allowing recovery of double wages, was set aside and superseded by its later decree, which allowed recovery only for the amount claimed for loss of petitioner's clothing and for earned wages.

We find it unnecessary to decide the questions raised with respect to the liability of the government for double wages. For upon examination of the record it is apparent that petitioner has failed to establish his right to the double wages demanded, regardless of the asserted immunity of the government.

Both courts below are in substantial agreement as to the facts which, so far as now material, may be detailed as follows: Petitioner shipped as a fireman on the S. S. American Shipper on a voyage from New York to London and return; on arrival at London, he demanded of the master his discharge, payment of the balance of wages due, one month's additional pay, and that he be provided with adequate employment on some other vessel bound for New York. As reason for his demand he quoted the titles of § 2 of the Seamen's Act and R. S. § 4583. The master, who was then occupied with his duties in advancing money to members of the crew who were about to take shore leave, offered to pay one-half the wages due, which petitioner refused. The master then told him that he did not know what the cited sections of the statute were about and that he would have to look them up. He asked petitioner to meet him in the office of the American Consul in London, whose address he gave, shortly after noon of the following day, when he would discuss with petitioner the matter of his demand.

Petitioner went to the Consulate the next forenoon and left about half-past eleven, after stating his complaint and being informed by the Consul that he was not entitled to his discharge. He requested that the decision be placed in writing; this was done and sent to him in care of the vessel. The master, who had been busy preparing his papers for entry at the customs house, arrived

at the Consulate about two o'clock of the same day and was told that the petitioner had been there and had gone. He then returned to the vessel, where he remained most of the time it was in port, but did not see petitioner again. Petitioner testified that he returned to the vessel, knocked at the master's door that night and again the next morning, but received no answer at either time. He then asked the chief mate if the master was aboard and the mate said that he didn't know. On that day he left the vessel, without making any further attempt to see the master, or leaving any information which would enable the officers to communicate with him. When he asked the mate for a pass for his clothes he was told that the mate could not give him one and he was not allowed to take his clothes with him. He did not intend to return to the vessel when he left, and never did return. After some weeks in England he purchased passage on another vessel and returned to the United States.

1. The petitioner rests his claim for a month's extra pay and for the cost of his return passage on § 2 of the Seamen's Act and R. S. § 4583. By § 2 a seaman is given the right to demand his discharge and payment of the wages due whenever the master of the vessel fails while at sea to divide the sailors into at least two, and firemen, oilers and water-tenders into at least three, watches. In *O'Hara* v. *Luckenbach Steamship Co.,* 269 U. S. 364, 367, we held that the purpose of this provision was to provide for the safety of vessels at sea rather than to regulate working conditions of the crew, and that it commands division of the specified classes of the crew into watches as nearly equal as the number in each class will permit.

Section 4583 provides that:

"Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is . . . unseaworthy, . . . it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he was originally shipped. . . ."

As the government sought no review, either in the Court of Ap-

peals or in this Court, of the determination of the district court that petitioner was entitled to demand his discharge and payment of his earned wages because of the failure to make proper division of the crew into watches, there is no occasion for us to pass on that question. Nor do we decide the further one, which the petitioner raises, whether a seaman is entitled to claim the benefits of § 4583 by reason of a failure to provide equal watches as directed by § 2 of the Seamen's Act. Laying aside that question and possible doubts as to the correct construction of other parts of § 4583, it is plain that by its provisions the Consul or Consular Agent is made the arbiter of the seaman's demand for the month's extra wages and for other relief which it affords, and that his favorable action upon the demand and his discharge of the seaman are prerequisite to any recovery under it. As in the present case the Consul refused to give petitioner his discharge and to certify that he was entitled to the relief demanded, his recovery under that section was rightly denied by the courts below.

2. The seaman's right to double wages for failure of the master to pay wages due is conferred by R. S. §4529.[1] By this section the master or owner of a vessel is required to pay a seaman his wages within a specified time after the termination of the agreement under which he was shipped or after the time of his discharge, whichever first happens. In the case of vessels making foreign voyages, payment is required within twenty-four hours after the cargo has been discharged or within four days after the seaman has been discharged, whichever first happens. In all cases the seaman

[1]Sec. 4529. The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port or the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. (46 U. S. C. 596.)

is entitled at the time of his discharge to one-third of the balance of wages due him. It directs that "Every master or owner who refuses or neglects to make payment in the manner" specified "without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages. . . ."

Since it does not appear in the present case when the cargo was discharged, the time within which the master could pay the wages due and thus avoid liability for double wages cannot be taken to be less than four days from the time of arrival. There is no question of failure to pay one-third of the wages due since petitioner did not avail himself of the master's offer to pay him one-half of his wages. As it has been determined that the petitioner was entitled to his discharge and to payment of the wages due, and as payment was not made within the time specified by the statute, we may assume, for present purposes, that he was entitled to the double pay demanded if the master's failure to pay the wages due was "without sufficient cause."

We had occasion to pass upon the meaning of this phrase, as used in § 4529, in *Collie* v. *Ferguson*, 281 U. S. 52, where it was held that there was no right to double wages where the failure to pay earned wages was occasioned by the insolvency of the owner and the arrest of the vessel subject to accrued claims beyond her value. After pointing out that the words "without sufficient cause" must be taken to mean something more than the absence of valid defenses to the claim for wages, we said, page 55:

"the phrase is to be interpreted in the light of the evident purpose of the section to secure prompt payment of seamen's wages (H. R. Rep. 1657, Committee on the Merchant Marine and Fisheries, 55th Con., 2nd Sess.) and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which as a class they are peculiarly exposed.

"The words 'refuses or neglects to make payment . . . without sufficient cause' connote, either conduct which is in some sense arbitrary or wilful, or at least a failure not attributable to impossibility of payment. We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible."

The statute thus confers no right to recover double wages where the delay in payment of wages due was not in some sense arbitrary, willful or unreasonable. In view of the many duties imposed, some by law, on the master of a vessel upon arrival in a foreign port, we cannot say that the statute compels him, on pain of subjecting himself or his owner to heavy loss, to make immediate decision of questions of law involved in a seaman's demands, of whose nature he is left in ignorance. In the circumstances, he did not unreasonably defer action by fixing the following day and the Consul's office as the time and place for his decision. The failure of petitioner to keep the appointment and to communicate with the master again, after rejection by the Consul of petitioner's demand, left the master uninformed whether or not petitioner still persisted in his demand. His departure from the vessel on the following day, without leaving an address, precluded payment of the wages due within the four days which the statute allowed. The case is not one of neglect to pay wages without sufficient cause.

In its opinion before reargument the district court, notwithstanding its conclusion that the master had sufficient cause for his failure to pay wages, ruled that the petitioner was entitled to recover double pay for the number of days which had intervened after the suit was brought. Petitioner argues here that, as there was no excuse for delay in payment after the suit was brought, the duty to pay double wages accrued from that date. But the liability is conditioned by the statute upon the refusal or neglect to pay wages "in the manner hereinbefore mentioned without sufficient cause." The quoted phrase refers to the specified periods within which the seaman's wages are directed to be paid, and the section thus imposes the liability for neglect, without sufficient cause, to pay the wages within the prescribed period. Petitioner seeks, by a more liberal interpretation of the words, to impose the liability for such delay in payment, without sufficient cause, as may occur at any time after an excusable failure to pay within the prescribed period. This possibility is precluded by the further provision of the section that double wages shall be paid for each day "during which payment is delayed beyond the respective periods" within which the payment is to be made. Thus, liability for double wages accrues, if at all, from the end of the period within which payment should have been made. It must be deter-

mined by the happening of an event within the period, failure to pay wages without sufficient cause. The statute affords a definite and reasonable procedure by which the seaman may establish his right to recover double pay where his wages are unreasonably withheld. But it affords no basis for recovery if, by his own conduct, he precludes compliance with it by the master or owner. He cannot afterward impose the liability by the mere expedient of bringing suit upon it.

3. Following the trial of the cause in the district court a decree was entered allowing recovery for loss of petitioner's clothing, for wages and double wages. After the reargument a second decree was entered which did not in terms vacate or modify the first one, but which granted recovery as in its first decree, except for double wages. After the appeal was taken to the Circuit Court of Appeals the district court amended the second decree by the addition of a direction that the first decree be vacated.

The application for rehearing was seasonably made and by granting it the district court retained jurisdiction of the case. The decree entered on the rehearing thus became the final decree in the cause and superseded the earlier one, as the court below held. *Barrell* v. *Tilton*, 119 U. S. 637, 643; see *Wolff Packing Co.* v. *Industrial Court*, 267 U. S. 552.

It is unnecessary to inquire whether, after the appeal was taken, the district court retained jurisdiction to correct its own records by vacating the first decree, which had already become *functus officio*. See *Hovey* v. *McDonald*, 109 U. S. 150, 157, 158.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 249.—October Term, 1934.

Livingston H. McCrea, Petitioner, *vs.* The United States of America, as owner of The S. S. "American Shipper," Engines, Tackle, Apparatus, etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 18, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner has moved for reargument of the question whether the failure to pay his wages was "without sufficient cause," on the ground that this Court "misapprehended the facts shown by the record" in accepting the finding of the district court that petitioner "departed the ship without seeing the captain" on the second day after her arrival at the port of London.

In support of this contention petitioner, for the first time, invites our attention to an excerpt from the vessel's log, an exhibit in the case, which states that he was "aboard ship from 3:20 PM Feb. 29th to 9:00 AM. March 1st, 1928" and that he was "last . . . seen aboard ship at 9:00 AM. March 1st, 1928." It is conceded that the vessel arrived in port on Sunday, February 26, 1928, and sailed the following Friday, March 2nd. As the year was a leap year, petitioner argues that he is thus shown to have been on board on the morning of the fourth calendar day after arrival; that, as the vessel sailed the following day, it may be inferred that he did not leave until the cargo was discharged; and that the failure to pay wages before his departure on March 1st was therefore without sufficient cause.

The details of petitioner's leaving the vessel were not considered by the Circuit Court of Appeals, presumably because its decision was placed on other grounds. But in this Court respondent properly sought to sustain the decision below on the ground that the failure to pay wages was not without sufficient cause. In its brief it

specifically relied on the finding of the district court that petitioner had abandoned the vessel two days after arrival, and cited the record in support of the finding. Petitioner in this Court neither challenged the finding of the district court nor assailed the sufficiency of the evidence to support it, and we are now asked, for the first time, by a motion for reargument, to weigh the evidence.

The petitioner, in his testimony in his own behalf, both on direct and cross-examination, testified at four different points in the record that he abandoned the vessel on February 28th, which was on Tuesday, two days after arrival. He identified the day of abandonment by its date, as being on Tuesday, and as being the day after his visit to the Consul's office, which was on Monday, February 27th. He was equally specific in his testimony that when he left the vessel he did not intend to return and did not in fact return. We accept his testimony as correct and as abundantly supporting the finding of the district court.

We also think, as the opinion indicates, that petitioner's departure from the vessel, whenever it occurred, without informing the master whether he persisted in his demand, precludes the inference that, in the circumstances, the failure to pay wages was "without sufficient cause." The motion is

Denied.

A true copy.

Test:

Clerk, Supreme Court, U. S.